EDITOR'S NOTE

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No. 86-322-CFX
Status: GRANTED

Title: Crawford Fitting Company, et al., Petitioners
v.
J. T. Gibbons, Inc.

Docketed:
August 29, 1986

Court: United States Court of Appeals
for the Fifth Circuit

Vide:
86-328

Counsel for petitioner: Cellini, Dando B.,

See also:

Counsel for respondent: Block, William H.

Entry	Date	Note	Proceedings and Orders
1	Aug 29 1986	G	Petition for writ of certiorari filed.
2	Sep 9 1986		Letter from petitioner in compliance with rule 28.1 filed.
3	Sep 17 1986		DISTRIBUTED. October 10, 1986
4	Sep 22 1986	X	Brief of respondent J.T. Gibbons, Inc. in opposition filed.
6	Nov 12 1986		REDISTRIBUTED. November 26, 1986
7	Nov 12 1986		REDISTRIBUTED. November 26, 1986
8	Dec 1 1986		Petition GRANTED. The case is consolidated with 86-328, and a total of one hour is allotted for oral argument.
			**********
9	Dec 13 1986	G	Motion of petitioners to dispense with printing the joint appendix filed.
10	Jan 12 1987		Motion of petitioners to dispense with printing the joint appendix GRANTED.
11	Jan 15 1987	X	Brief of petitioners Crawford Fitting Co., et al. filed.
12	Jan 28 1987	G	Motion of respondents for divided argument filed.
13	Jan 31 1987	G	Motion of petitioners for divided argument filed.
14	Feb 17 1987		Record filed.
15	Feb 17 1987		Certified copy of original record and proceedings, 5 boxes, received.
16	Feb 19 1987		Brief of respondent J.T. Gibbons, Inc. filed.
17	Feb 23 1987		Motion of respondents for divided argument GRANTED.
18	Feb 23 1987		Motion of petitioners for divided argument GRANTED.
19	Mar 13 1987		CIRCULATED.
20	Mar 11 1987		SET FOR ARGUMENT. Wednesday, April 29, 1987. This case is consolidated with No. 86-328. (2nd case) (1 hour).
21	Apr 22 1987	X	Reply brief of petitioners Crawford Fitting Co., et al. filed.

86-322

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CRAWFORD FITTING COMPANY,
CAPITAL VALVE & FITTING COMPANY, INC.,
THOMAS A. READ & COMPANY,
FRED A. LENNON and ROBERT D. JENNINGS,
Petitioners

v.

J. T. GIBBONS, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether or not district courts have any discretion under Fed. R. Civ. P. 54(d) to tax costs, such as expert witness fees, beyond the scope of those items listed in 28 U.S.C. § 1920.

PARTIES TO THE PROCEEDINGS

The parties to these proceedings are petitioners Crawford Fitting Company, Fred A. Lennon, Capital Valve & Fitting Company, R. D. Jennings and Thomas A. Read & Company, Inc. and respondent J. T. Gibbons, Inc.

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v.

J. T. GIBBONS, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Crawford Fitting Company, Capital Valve & Fitting Company, Inc., Thomas A. Read & Company, Fred A. Lennon and Robert D. Jennings respectfully pray that a writ of certiorari be issued to review the *en banc* decision of the United States Court of Appeals for the Fifth Circuit entered in this case on June 2, 1986.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction of the District Court was based upon Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26.

OPINIONS BELOW

The memorandum opinion of the District Court, reported at 102 F.R.D. 73 (E.D. La. 1984), is reprinted as Appendix A hereto. The May 17, 1985 opinion of a panel of the Fifth Circuit Court of Appeals, 760 F.2d 613 (5th Cir. 1985), is reprinted as Appendix B hereto. The June 2, 1986 *en banc* opinion of the Court of Appeals for the Fifth Circuit is reprinted as Appendix C hereto.

STATUTES INVOLVED

The statutes involved herein, 28 U.S.C. § 1920, 28 U.S.C. § 1821 and Rule 54(d) of the Federal Rules of Civil Procedure, are reprinted as Appendix E hereto.

STATEMENT OF THE CASE

Plaintiff filed this action in federal district court, claiming that petitioners engaged in numerous violations of the federal antitrust laws, 15 U.S.C. §§ 1 and 2, including a group boycott, horizontal and vertical price fixing, market allocation, predatory pricing, monopolization, and attempt and conspiracy to monopolize. The trial court directed a verdict in favor of defendants on all of plaintiff's claims, and entered judgment dismissing the complaint at plaintiff's cost. *J.T. Gibbons, Inc. v. Crawford Fitting Company, et al.*, 565 F. Supp. 167 (E.D. La. 1982). The Fifth Circuit Court of Appeals affirmed the trial court's rulings in all respects. *J.T. Gibbons, Inc. v. Crawford Fitting Company, et al.*, 704 F.2d 787 (5th Cir. 1983).

Defendants filed a Bill of Costs with the Clerk of Court, who taxed the costs for audio-visual equipment and assistance, copies of depositions, and daily trial transcripts. Not taxed as costs were expert witness fees, and attorneys' fees and expenses incurred in connection

with depositions taken by defendants in Scotland. After a *de novo* review, the district court awarded defendants those costs taxed by the Clerk, as well as some of defendants' expert witness fees, and attorneys' fees and expenses incurred in connection with the Scotland deposition. The court's award of expert witness fees as costs was based upon the "indispensability" rule recently developed by several circuit courts of appeals. Under this rule, a district court has discretion under Fed. R. Civ. P. 54(d) to award a prevailing party expert witness fees beyond the per diem and travel allowance for ordinary witnesses prescribed by 28 U.S.C. §§ 1920 and 1821, where the expert testimony was indispensable to the presentation of the case. 102 F.R.D. 73.

Applying the indispensability rule to the facts before it, the trial court made a factual finding that the testimony of two of the three expert witnesses used by defendants at trial was crucial and indispensable to the determination of the issues in the case. 102 F.R.D. at 86-87. It also found that, "It is particularly appropriate to award defendants the costs of indispensable expert witness testimony under the circumstances of this case, where the defendants were forced to defend an extremely burdensome, vexatious, and totally meritless array of antitrust claims." 102 F.R.D. at 86. On appeal, a panel of the Fifth Circuit sustained the district court's award of costs, except that it reversed the award of expert witness fees in excess of the ordinary per diem and travel allowance prescribed by 28 U.S.C. §§ 1920 and 1821. 760 F.2d 613 (5th Cir. 1985). Subsequently, the Fifth Circuit *sua sponte* ordered a hearing *en banc*.

On the same date, it granted a rehearing *en banc* in *International Woodworkers of America, AFL-CIO and its Local No. 5-376*, 752 F.2d 163 (5th Cir. 1985) (hereinafter "*IWA*"). The prevailing defendant in *IWA*, an

employment discrimination suit, had requested expert witness fees as a litigation expense incidental to an award of attorneys' fees authorized by the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988. The district court found that that statutory provision did not authorize such an award, and a panel of the Fifth Circuit affirmed this ruling. 752 F.2d 163 (5th Cir. 1985). In a majority opinion authored by Judge Carolyn Dineen Randall, the *en banc* court in the *IWA* case, adopting by analogy the rule with respect to awards of attorneys' fees set forth in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), held that expert witnesses fees in excess of the per diem and travel allowance specified in § 1821 for ordinary witnesses are not generally taxable as costs.

On the same date, the Fifth Circuit applied its sweeping new rule herein, reversing the district court's award of expert witness fees to the prevailing defendants in excess of the amount allowed by 28 U.S.C. § 1821. It did so although the costs in the instant suit were sought on a completely different basis from that in the *IWA* case. The *IWA* case involved a request by a prevailing defendant for an award of expert witness fees incidental to an award of attorney's fees under the Civil Rights Attorney's Fee Award Act, 42 U.S.C. § 1988. In the instant case, the prevailing defendants in an antitrust case invoked the trial court's general discretion under Fed. R. Civ. P. 54(d) to recover costs, including expert witness fees. The *en banc* court applied the same rule to both cases without distinction.

REASONS FOR GRANTING THE WRIT

The justification for the issuance of a writ of certiorari herein is two-fold. First, the issue involved—the scope of a district judge's authority, if at all, to award costs beyond 28 U.S.C. § 1920—is an issue which arises in each

and every case that proceeds to judgment on the merits. The decisions of the federal circuit courts of appeals reflect that different rules have been formulated on this issue, which routinely confronts district judges across the country. The rule laid down by the Fifth Circuit herein comports with none of the rules so far enunciated. This Court should lay to rest the confusion among the circuits and adopt a uniform rule to be applied nationwide by all district courts.

Secondly, the issue presented involves an important question of federal policy, the resolution of which will have a significant impact upon the allocation of the costs of modern litigation in America. At a time when even the American rule prohibiting awards of attorneys' fees to prevailing parties has been called into question, it is particularly anamolous to deny district judges any discretion at all to include expert witness fees as taxable costs. Given the special concern which the legal profession and the lay community alike have lately focused upon the general attitudes toward litigation in this country, we respectfully suggest that this second factor is at least as compelling—and perhaps more compelling—than the traditional component of a clear conflict among the circuits. Taken together, they comprise special and important reasons for the issuance of the writ prayed for, as required by the Rules of this Honorable Court.

A. There Exist Numerous Direct Conflicts Among The Circuits On The Question Presented By This Petition.

The instant case involves the proper interpretation of two statutes, Fed. R. Civ. P. 54(d) and 28 U.S.C. § 1920. Fed. R. Civ. P. 54(d) provides that "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs." 28 U.S.C. § 1920 reads as follows:

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

The amount of "fees . . . for . . . witnesses," 28 U.S.C. § 1920(3), is limited to the minimal statutory per diem contained in 28 U.S.C. § 1821. *See* Appendix E.

The federal circuit courts of appeal have adopted a hodgepodge of different rules with respect to the discretion afforded a district judge under 28 U.S.C. §§ 1920, 1821 and Fed. R. Civ. P. 54(d) to award fees of expert witnesses beyond the parameters of 28 U.S.C. §§ 1920 and 1821. In his dissent to the majority ruling herein, Judge Alvin B. Rubin summarized the various rules as follows:

> The First Circuit has permitted the discretionary award of expert witness fees for courtroom testimony, noting that an express finding that the testimony was indispensable is usually required, but that prior court approval will suffice.
>
> . . .

> The Third Circuit in the maritime tort case of *Roberts v. S.S. Kyriakoula O. Lemos*, expressly permitted the award of expert witness fees in a maritime tort case when the expert's testimony is indispensable to the determination of the case or played a crucial role in the resolution of the issues presented.
>
> . . .
>
> Our own circuit has permitted expert witness fees to be awarded not only under [42 U.S.C.] § 1988, but in cases of bad faith litigation, and when, after prior court approval, the testimony proved indispensable to the determination of the case.
>
> The Sixth Circuit has affirmed an award of expert witness fees in a civil rights case, rejecting the argument that such fees were expenses incidental to [42 U.S.C.] § 1988 attorney's fees, and awarding them instead pursuant to the court's sound discretion under § 1920 and Rule 54(d). The district court had reduced the amount allowed to one-half the amount claimed because the expense had been incurred without prior approval of the court and was excessive.
>
> The Eighth Circuit, like the Third, has permitted the award of expert witness fees. . . . Although it did so in an antitrust case arising under the Clayton Act, the court [held] that "Fed. R. Civ. P. 54 authorizes district judges to award costs not specifically enumerated in 28 U.S.C. § 1821 [or § 1920]." It has reached the same result in cases not involving a fee-shifting statute.
>
> The Ninth Circuit permits the award of expert witness fees if the testimony is necessary to the case and the fees are reasonable. In *Thornberry v. Delta Airlines, Inc.*, it describes the court's authority to award these costs as limited to special circumstances. However, it interprets these circumstances broadly, considering "the reasonable needs of the party in the context of the litigation." While *Thornberry* was a civil rights case, to which § 1988 was applicable, the court relied only upon Rule 54(d).

The District of Columbia Circuit has found no authority for a court to award excess expert witness fees but qualified this rule by an exception "if the district court approves in advance or requires the testimony of a specially qualified witness who will furnish information or evidence not otherwise reasonably accessible to the court and whose appearance is determined to be critically important to the case."

Other circuits have denied the award of expert witness fees in excess of the amount allowed ordinary witnesses by 28 U.S.C. § 1821. The Second and Fourth Circuits have addressed the issue only in antitrust cases and have held, I believe incorrectly, that the Clayton Act's allowance of "cost of suit" does not permit awards in excess of § 1920 costs. The Seventh Circuit recognizes that courts "retain some discretion to tax costs not specifically provided for by statute", . . . but limits that discretion to unspecified "exceptional circumstances." Finally, the Tenth and Eleventh Circuits have categorically denied district courts the discretionary authority to award witness fees in excess of the amounts specified in § 1821, although they have not extended this limitation to § 1988 cases.

Appendix D at pp. 77a-81a (citations omitted).

The rule adopted by the *en banc* court below differs materially from any rule formulated thus far. It is borrowed wholesale from the so-called "American Rule" developed by this Court, which provides that attorneys' fees are awardable only when expressly authorized by Congress or when one of three narrow equitable exceptions applies.[1] *Alyeska Pipeline Service Co. v. Wilderness*

[1] The three narrow equitable exceptions apply where (1) the trustee of a fund or property, or a party in interest, preserved or recovered the fund for others in addition to himself; (2) a party acted in willful disobedience of a court order; or (3) the losing party acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

Society, 421 U.S. 240 (1975). Thus, under the Fifth Circuit's new rule, expert witness fees, like attorneys' fees, are not awardable as costs in excess of 28 U.S.C. § 1920, except where Congress has expressly so authorized or when one of three equitable exceptions applies.

Judge Rubin in his dissenting opinion herein summarized the state of the law in this area as follows:

> In sum, six circuits permit the award of expert witness fees when the testimony is indispensable or when advance court approval is obtained. Two circuits categorically deny district courts any such authority under the Clayton Act, and two deny them any authority whatsoever under Rule 54(d) to award costs not provided for by statute. But none engrafts the *Alyeska* attorney's fee exceptions onto a rewritten § 1920.
>
> Appendix D at p. 81a.

The Fifth Circuit developed its new rule in the context of deciding whether 42 U.S.C. § 1988, which authorizes an award of attorneys' fees to a prevailing party in a civil rights case, implicitly includes an award of expert witness fees. As Judge Rubin noted in his dissent, the court below "applies that rule to the recovery of expert witness fees without considering the recoverability of other litigation expenses. And it applies that rule without distinction to two dissimilar cases in which the recovery of expert witness fees is sought on completely different bases." Appendix D at p. 59a. In *IWA*, a prevailing defendant in an employment discrimination suit requested expert witness fees as a litigation expense incidental to an award of attorney's fees authorized by the Civil Rights Attorney's Fees Awards Act. 42 U.S.C. § 1988. In the instant case, the prevailing defendants in an antitrust suit, invoked the trial court's general discretion under Fed. R. Civ. P. 54(d) to recover costs, including the fees of expert witnesses.

Four judges concurred in the result in the *IWA* case and dissented from the majority opinion in the instant case. Writing for all four dissenters, Judge Rubin criticizes the majority opinion as illogical and inconsistent with every other circuit court decision on the issue.

The majority rule is premised in large measure on this Court's decision in *Henkel v. Chicago, St. Paul, Minnesota and Omaha Railway Co.*, 284 U.S. 444 (1932). That case held that expert witness fees were included within, and limited to, the per diem and travel allowances for ordinary witnesses in 28 U.S.C. §§ 600 (a) and (c) (precursors of 28 U.S.C. §§ 1920 and 1821). Conceding that the issue in *Henkel* was the same as that before the *en banc* court below, Judge Rubin correctly noted that the district court powers with which *Henkel* dealt have altered since the date of that decision. *Henkel* was decided before the adoption of the Federal Rules of Civil Procedure, and thus before the merger of actions at law and equity. At that time, courts sitting in law had no power to award costs not expressly granted by statute. In equity, courts have always retained the power to award costs not specified by statute. With the merger of law and equity under the Federal Rules of Civil Procedure, Rule 54(d) gave federal courts in all actions the broader discretion previously afforded only to courts of equity. Appendix D at pp. 74a-75a. The majority acknowledges this equitable power to the extent that it recognizes three equitable exceptions to its rule. There is no rational basis for its acknowledgement of this power in three narrow circumstances, but in no others.

Since the adoption of Rule 54(d), this Court has only once addressed the district courts' power to tax costs in excess of those specified in § 1920. In *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964), the district court refused to tax as costs litigation expenses for witness travel and overnight transcripts. Although it affirmed

the disallowance, the Court declined to rest its decision on a determination that § 1920 did not expressly permit these costs. Instead, it relied on Rule 54(d), saying:

> We do not read [Rule 54(d)] as giving district judges unrestrained discretion to tax costs to reimburse a winning litigant for every expense he has seen fit to incur in the conduct of his case. Items proposed by winning parties as costs should always be given careful scrutiny. . . . [T]he discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute.
>
> 379 U.S. at 235.

As Judge Rubin concisely comments in his dissent below, the "Court's conclusion reveals its premise: Rule 54(d) gives the district court discretion [albeit sparing] to award costs not enumerated in § 1920." Appendix D at p. 77a.

Other Circuit Courts have reached the same conclusion. In *Paschall v. Kansas City Star Co.*, 695 F.2d 322 (8th Cir. 1982), *rev'd on rehearing on other grounds*, 727 F.2d 692 (8th Cir. 1984), the Eighth Circuit Court of Appeals held that the language from *Farmer* quoted above "authorizes district judges to award costs not specifically enumerated in 21 U.S.C. § 1821." 695 F.2d at 338. Thus, the rule in the Eighth Circuit is that district courts have discretion to award expert witness fees as costs when expert testimony is "crucial" or "indispensable" to the determination of the case. *Id.* at 339. *Paschall* was a complex antitrust lawsuit, as is the instant case. The Court in *Paschall* found that the expert testimony concerning competitive impact was "the most important issue" in the case, and affirmed an award of expert witness fees as costs. *Id.*

Reading the *Farmer* opinion in the same way as the Eighth Circuit, the Third Circuit Court of Appeals also

recognized an "indispensability" rule in *Roberts v. S.S. Kyriakoula D. Lemos*, 651 F.2d 201 (3d Cir. 1981). After quoting the language from *Farmer* relied on by the Eighth Circuit in *Paschall*, the Third Circuit reached the following conclusion in *Roberts*:

> *Farmer* appears to hold that Rule 54(d) authorizes district judges to exercise discretion—albeit "sparing"—to award costs not specifically enumerated in § 1821. The Court seems concerned to avoid taxation of unnecessary and possibly vexatious costs accumulated by a prevailing party. Hence the reference to a national policy in favor of restrained award of costs. It is important to note that the Court based its interpretation of Rule 54(d) not on a *Henkel*-type theory of statutory preclusion of costs not listed in § 1821, but on policy considerations militating against award of unenumerated costs. A district court should therefore carefully scrutinize the prevailing party's bill of costs in order to assure that any award will compensate only those expenditures necessary to the litigation. While *Farmer* commands perhaps a tight-fisted exercise of discretion in order to ensure moderation in the cost of litigation, it does not mandate parsimony to the extent of precluding recovery of legitimate and indispensable litigation expenditures. We therefore agree with the District of Minnesota and the Eighth Circuit that *Farmer* affords a district court equitable discretion to award expert witness fees when the expert's testimony is indispensable to determination of the case. 651 F.2d at 206.

It is respectfully submitted that the rule adopted by the majority below, which denies district courts any discretion to tax costs outside of § 1920, is contrary to law and renders "Rule 54(d) . . . completely redundant, without any independent force or meaning." Appendix D at p. 74a.

B. The Instant Petition Addresses Critical Policy Issues Regarding Allocation of the Enormous Costs of Modern Litigation in Federal Courts.

Judge Rubin's dissent below squarely acknowledges the important public policy implications of the issue raised by this case. He observed that:

> [T]he costs of litigation, as we all know, have become staggering. A plaintiff may put a defendant or a defendant may put a plaintiff to a tremendous amount of expense, apart from the cost of obtaining an attorney's services in defending or prosecuting a case. One cause of this expense is the unavoidable necessity of expert witness testimony to establish or rebut many legal claims, especially those raised in . . . antitrust cases. [E]xpert witness testimony controls the outcome in two-thirds of all cases, and . . . are second only to attorneys' fees as the largest litigation expense.
>
> Appendix D at p. 82a.

In a 1976 address to the Ninth Circuit Judicial Conference, Francis Kirkham opined that "litigation is the new growth industry." F. Kirkham, *Complex Civil Litigation "Have Good Intentions Gone Awry?,"* 70 F.R.D. 199, 204 (1976). The relevant figures since then seem to have borne him out. In 1968 there were about 71,000 civil cases filed in the federal courts. By 1977, the number had risen to 130,000; by 1980 it was 180,000, and by 1984, the figure was 261,485. ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1984). The latest statistics show that 278,793 civil cases were filed in 1985. FEDERAL JUDICIAL WORKLOAD STATISTICS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1985).

Considerable commentary has been devoted to analyzing why the legal system in the United States seems to spawn so much more litigation than other legal systems around the world, and the explanations have ranged so far afield that even a genetic predisposition among Amer-

icans toward litigation has been suggested. Among practitioners of the law, however, it is well known that the litigation engine is principally fueled by a volatile mixture of a large number of lawyers, the legality of contingency fee agreements and the so-called "American Rule," which requires each litigant to bear the cost of his own attorneys' fees, win or lose. The impetus this blend gives to the filing of tenuous claims is readily apparent in the burgeoning field of complex business litigation. As one commentator has noted, "Business managers consider litigation a business activity like any other, and engage their company in litigation only if they expect that it will produce a good return or avert a bad return." T. Shreve, *Attorneys' Fee Awards to Complex Litigation Defendants: Striking a Balance*, 77 Nw. L. Rev. 818, 830 (1983). In deciding whether or not to press a claim such as the one brought against petitioners herein, a business manager goes through the normal process of a cost/benefit analysis, weighing the potential risks against the potential returns. Traditionally, the potential risks have been virtually nonexistent. Under the normal contingency fee agreement, the plaintiff is only responsible for routine expenses, which comprise a very small part of the total expenditures involved in pursuing complex litigation. On the other hand, the potential rewards can be astronomical, especially in antitrust cases, where the actual damages awarded are automatically trebled. The incentives are therefore great to pursue even the most marginal of claims.

The antitrust lawsuit which gave rise to the instant petition typifies these problems. As the trial court below observed in its opinion granting directed verdicts for petitioners, the plaintiff in this action asserted that petitioners had committed virtually every offense proscribed by the Sherman Act, including group boycott, refusal to deal, horizontal and vertical price fixing, illegal data dissemination, horizontal and vertical allocation of territories, predatory pricing, and conspiracy and attempt to monopolize.

Although the law provides that the plaintiff bears the burden of proof on each element of its claims, every trial lawyer knows that the average jury assumes the full majesty of the law could not possibly be brought into play unless there is a strong likelihood that someone had done something wrong. Moreover, in complex litigation such as antitrust cases, the defense lawyer cannot rely on the jury's instincts for what is right to yield the correct result, because virtually all of the testimony is likely to relate to matters that are entirely beyond the ken of the average juror. Thus, in a case which presents doubtful claims from a legal point of view, the plaintiff's lawyer must focus on getting the case to the jury for a decision (where he knows the marginal nature of the claim will not be at all apparent), and the defense lawyer must concentrate on presenting so complete a case that the judge will feel that it is his obligation to direct a verdict.

Often, extensive expert testimony is the only way for the defense to conclusively demonstrate that a directed verdict is appropriate as a matter of fact and law. For example, respondent herein made bald allegations charging petitioners with violations of § 1 and § 2 of the Sherman Act. Dr. Thomas Saving, an expert economist, was retained by petitioners to analyze the relevant industry. Not only did he testify that the industry is extremely competitive, with very low entry barriers, but he also found that petitioner Crawford Fitting Company "has a small segment in the industry and completely lacks market power." 565 F. Supp. 167 at 180. Dr. Philip Robers, a supply and transportation expert for petitioners, was called to testify with respect to plaintiff's claim that it had been boycotted. After conducting an exhaustive study of plaintiff's purchase orders, invoices, shipping orders and other relevant documents, Dr. Robers reached the following conclusions: first, it was clear that plaintiff had never in fact been boycotted because it always had access to as much of the product as it wanted through an alternate source; and second, the plaintiff's own rec-

ords demonstrated conclusively that this alte nate source furnished the product at better prices, and with superior delivery times, than plaintiff had received from petitioner Crawford. 102 F.R.D. at 86-87.

After hearing all of the testimony, the trial court granted directed verdicts on all counts for petitioners and, in its opinion awarding costs to petitioners, specifically described the panoply of charges brought by plaintiff Gibbons as "an extremely burdensome, vexatious, and totally meritless array of antitrust claims." *Id.* at 86. The Fifth Circuit Court of Appeals affirmed the trial judge's directed verdict rulings in all respects. Noting that this litigation had been brought basically as a refusal to deal case, even though it was undisputed that the plaintiff always had access to the product involved, the Fifth Circuit specifically observed that "[t]he *sine qua non* of the injury caused by a refusal to deal would be inability to obtain the product." 704 F.2d 787 at 792.

Nonmeritorious cases of this kind are routinely pursued in our legal system because an objective cost/benefit analysis makes them attractive. The United States has the highest ratio of lawyers per capita of any nation in the world, so there is an abundance of attorneys willing to press dubious causes. The legality of contingency fee arrangements, which are forbidden in many other countries, effectively eliminates funding concerns. And finally, there is the "American rule." No other legal system in the world requires the winner in litigation to pay his own expenses. *See* Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 Cal. L. Rev. 792, 798 (1966). But that has been historically the rule in this country, where a successful defendant is generally limited to recovering nothing more than routine court costs.

Taken together, these factors permit plaintiffs to bring marginal lawsuits at very low risks. Indeed, they clearly encourage the filing of such suits. Petitioners submit

that the litigation explosion which has troubled both the legal profession and the lay community is, in large measure, attributable to the confluence of these factors. The "indispensibility rule" adopted by the Third and Eighth Courts of Appeals is an intelligent and effective restraint against gross abuses which can be effectuated without the sweeping policy changes which would be required to alter the now firmly entrenched American Rule. The "indispensability rule" is neither drastic nor automatic: it gives content to the language of Fed. R. Civ. P. 54(d) and allows district courts the discretion to award expert witness fees in appropriate circumstances. Such a rule would have the salutary effect of giving the potential plaintiff with a dubious claim at least a moment's pause to consider the increased risks before leaping into the litigation arena.

CONCLUSION

A clear conflict among the circuits exists—that much cannot be gainsaid. Indeed, it is more accurate to say that the circuits are in disarray on the question presented here. Can this conflict fairly be characterized as the type of "tolerable conflict" alluded to by the Honorable Chief Justice Burger during the course of the proceedings of the 1984 Judicial Conference of the District of Columbia Circuit? *Proceedings of Forty-Fifth Judicial Conference of the District of Columbia Circuit*, 105 F.R.D. 251, 260 (1984).

It is petitioners' belief that this question must be answered in the negative. Admittedly, there is a temptation to regard questions such as that presented by the instant petition as administrative rather than substantive in character—and hence less urgent. Such a distinction is too facile, for it is precisely questions of this kind that set the underlying tone and tempo of a nation's judicial system. Resolution of the question presented herein will affect every United States district court in the nation, and virtually every litigant or prospective litigant in

those courts. In petitioners' view, the doctrine of tolerable conflicts is inapplicable to issues of such far-reaching practical importance. Petitioners therefore urge this Honorable Court to issue a writ of certiorari to review the decision of the Fifth Circuit Court of Appeals entered on June 2, 1986 in this matter.

Respectfully submitted, this 29th day of August, 1986.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 84-3332

J. T. GIBBONS, INC.,
Plaintiff-Appellant,

v.

CRAWFORD FITTING COMPANY, et al.,
Defendants-Appellees.

Filed June 2, 1986

Before: Clark, Chief Judge, Goldberg, Gee, Rubin, Reavley, Politz, Randall, Johnson, Williams, Garwood, Jolly, Higginbotham, Davis, Hill and Jones, Circuit Judges.*

Opinion by Judge Carolyn Dineen Randall; Dissent by Judge Alvin B. Rubin, with whom Goldberg, Johnson and Williams join.

Appeal from the United States District Court for the Eastern District of Louisiana
Edmund L. Palmieri, District Judge
(Sitting by Designation), Presiding

OPINION

CAROLYN DINEEN RANDALL, Circuit Judge:

This case involves the application of the rule announced today in *International Woodworkers of America, AFL-*

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* Due to his death on March 27, 1986, Judge Albert Tate, Jr. did not participate in this decision.

CIO, CLC and its Local No. 5-376 v. Champion International Corporation, No. 83-4616 (5th Cir. June 2, 1986). The plaintiff, J.T. Gibbons, Inc. ("Gibbons"), brought suit against the defendants, Crawford Fitting Company, and others (collectively "Crawford"), alleging antitrust violations. At the conclusion of the evidence, the district court directed a verdict against Gibbons, 565 F. Supp. 167, which was affirmed by a panel of this court on appeal. 704 F.2d 787. Crawford, on behalf of all defendants, filed a Bill of Costs with the District Clerk. The Clerk taxed all costs requested by Crawford with the exception of certain expert witness' fees, and attorneys' fees and expenses incurred in connection with a deposition taken by Crawford in Scotland. Both Gibbons and Crawford contested the Clerk's assessment of costs in the district court. Following a hearing, the district court altered the Clerk's assessment and awarded Crawford over $151,000, including expert witness' fees, and attorneys' fees and expenses for the Scotland deposition. 102 F.R.D. 73.

A panel of this court sustained the district court's award of costs to Crawford for audio-visual equipment and assistance; for copies of depositions noticed by Gibbons; for daily trial transcripts; and for Crawford's expenses and attorneys' fees in connection with the Scotland deposition. 760 F.2d 613. The panel opinion, however, reversed the district court's award of expert witness' fees in an amount greater than that prescribed by 28 U.S.C. § 1821. This court voted to rehear the case en banc, thereby vacating the panel opinion. *See* Fifth Circuit Local Rule 41.3.

At the outset, we reinstate Parts I through III of the panel opinion.[1] The remainder of the panel opinion, Part IV, is superseded in its entirety by this opinion.

[1] Part III(b) of the panel opinion, addressing the district court's award of costs for daily trial transcripts and transcript copies of depositions, cites *Copper Liquor Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1099 (5th Cir. 1982), (*Copper Liquor III*), *modified on other grounds en banc*, 701 F.2d 542 (5th Cir. 1983), overruled in part in *International Woodworkers of America, ante*. The cited portion of *Copper Liquor III* indicates that the costs for transcript copies of depositions are recoverable under 28 U.S.C. § 1920(2). Section 1920(2) literally provides for recovery of the "fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case." In *United States v. Kolesar*, 313 F.2d 835, 837-38 (5th Cir. 1963), we held that "[t]hough § 1920(2) does not specifically mention a deposition, we agree with prior decisions suggesting that depositions are included by implication in the phrase 'stenographic transcript.'" Thus we reinstate the panel's reliance on a portion of *Copper Liquor III* not reversed by us stating that costs for transcript copies of depositions may be recoverable under § 1920(2) if "necessarily obtained for use in the case."

After consideration of the principles set forth in *International Woodworkers of America*, we reverse the district court's award of witness' fees in excess of the amount allowed by 28 U.S.C. § 1821. 15 U.S.C. § 15[2] provides for the award of attorneys' fees and the costs of suit to a prevailing plaintiff. Crawford, as a prevailing *defendant*, cannot fit within this statute. In addition, we agree with the Second, Sixth and Seventh Circuits that 15 U.S.C. § 15 does not authorize the taxing of excess expert witness' fees as costs. *See Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 309 n.75 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *Ott v. Speedwriting Publishing Co.*, 518 F.2d 1143, 1149 (6th Cir. 1975); *State of Illinois v. Sangamo Construction Co.*, 657 F.2d 855, 864-65 (7th Cir. 1981). As discussed in *International Woodworkers of America, ante*, Congress knows full well how to provide for the recovery of excess expert witness' fees as costs.

[2] 15 U.S.C. § 15 provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

That Congress did not do so in 15 U.S.C. § 15 is clear. To the extent that *Copper Liquor Inc. v. Adolph Coors Co.*, 684 F.2d 1087 (5th Cir. 1982), *modified on other grounds en banc*, 701 F.2d 542 (5th Cir. 1983), held otherwise, it is overruled. Crawford does not claim an exception to the American Rule. We thus reverse the district court's assessment of expert witness' costs and remand to the district court for reassessment of costs consistent with this opinion.

REVERSED and REMANDED.

ALVIN B. RUBIN, Circuit Judge, with whom GOLDBERG, JOHNSON, and WILLIAMS, Circuit Judges join, dissenting, for the reasons set forth in Judge Rubin's opinion concurring in the result of *International Woodworkers of America, AFL-CIO, CLC and its Local No. 5-376 v. Champion International Corporation*, No. 83-4616 (5th Cir. June 2, 1986).

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 84-3332

J.T. GIBBONS, INC.,
Plaintiff-Appellant,

v.

CRAWFORD FITTING COMPANY, *et al.*,
Defendants-Appellees.

May 17, 1985

Sessions, Fishman, Rosenson, Boisfontaine & Nathan, New Orleans, La. Joseph L. Alioto, John I. Alioto, Lawrence G. Papale, Alioto & Alioto, San Francisco, Cal., for plaintiff-appellant.

McGlinchey, Stafford & Mintz, Dando B. Cellini, New Orleans, La., for Crawford Fitting and Lennon.

Ernest P. Mansour, Cleveland, Ohio, Victoria L. Knight, New Orleans, La., for Crawford.

Dale, Owen, Richardson, Taylor & Mathess, Thomas E. Balhoff, Baton Rouge, La., for Capital Valve & Fitting Co.

Charles E. Hamilton, III, New Orleans, La., for Thomas Read & Co.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before GOLDBERG, TATE and JOLLY, Circuit Judges.

PER CURIAM:

Following the successful defense of an antitrust action, the defendant was awarded as costs of the litigation over $151,000, including more than $86,000 for expert witness fees. Because we find the award of expert witness fees to be in error, we reverse in part and remand.

I

The plaintiff, J.T. Gibbons, Inc. (Gibbons), brought suit against the defendants Crawford Fitting Company, and others (Crawford), alleging antitrust violations of sections 1 and 2 of the Sherman Act. At the conclusion of the evidence, the district court directed a verdict against Gibbons, 565 F.Supp. 167, which was affirmed by a panel of this court on appeal. 704 F.2d 787. Crawford, on behalf of all defendants, then filed a bill of costs with the district clerk. The clerk taxed all costs requested by Crawford, with the exception of certain expert witness fees and attorneys' fees and expenses incurred in connection with a deposition taken by Crawford in Scotland. Both Gibbons and Crawford contested the clerk's assessment of costs in district court. Following a hearing, the district court altered the clerk's assessment and awarded Crawford over $151,000, including expert witness fees, and attorneys' fees and expenses for the Scotland deposition. 102 F.R.D. 73. Gibbons now appeals.

II

Our primary reason for writing today is to address the question whether a district court may allow as costs

ot a lawsuit expert witness fees in excess of the statutory maximum provided in 28 U.S.C. § 1821. Gibbons has also taken issue with several other items of costs taxed by the district court. Because those issues involve well settled principles of law, we will briefly address each before considering the district court's assessment of expert witness fees.

III

A.

The first contested issue concerns costs awarded to Crawford for audiovisual equipment and assistance. The district court disallowed costs for the preparation of certain charts, but allowed the expenses incurred in connection with the operation of projection equipment, reasoning that the court's specific request for this equipment was tantamount to pretrial authorization. Gibbons argues that the district court did not formally authorize the audiovisual equipment prior to trial and did not provide Gibbons the necessary notice to make a formal objection to the use of the particular equipment. Gibbons also contends that the cost of the equipment, totalling $18,494.24, was unreasonable because similar equipment could have been procured at less expense.

It is settled that costs for charts, models and photographs may be taxed as costs only if there is pretrial authorization by the trial court. *Studiengesellschaft Kohle v. Eastman Kodak*, 713 F.2d 128, 133 (5th Cir. 1983); *Johns Manville Corp. v. Cement Asbestos Products Co.*, 428 F.2d 1381, 1385 (5th Cir.1970). Here the record reflects that prior to trial the district court requested the audiovisual equipment which, in fact, was used by both Gibbons and Crawford. Although the costs of the projection equipment and technical assistance might appear to be excessive, the district court had prior experience with the use of this special equipment and found it to be necessary and reasonable in conducting

such complex and lengthy antitrust litigation as that before it. The record does not reflect that the district court abused its sound discretion in taxing these expenses as costs.

B.

Gibbons also contests the costs awarded to Crawford for copies of depositions noticed by Gibbons and costs of daily trial transcripts. Gibbons argues that Crawford is not entitled to recover for the deposition copies because the depositions were noticed by Gibbons and because the copies were obtained merely for Crawford's convenience. Gibbons also contends that the cost of daily trial transcripts should not have been taxed because they also were primarily for Crawford's convenience and were not necessary for use in the case.

It is well established in this circuit that the cost of copies of deposition transcripts is taxable only if the copies were necessary for use in the case. *Eastman Kodak*, 713 F.2d at 133; *Copper Liquor, Inc. v. Adolph Coors*, 684 F.2d 1087, 1099 (5th Cir.1982). The same standard applies to awards of costs for daily trial transcripts. *Copper Liquor*, 684 F.2d at 1099; *United States v. Kolesar*, 313 F.2d 835, 840 (5th Cir.1963). The district court here found that the daily trial transcripts were necessary for use in the case, and we are convinced that the court was within its discretion. Furthermore, we can find no compelling reason, certainly in this case, to distinguish, as far as costs for copies are concerned, between depositions noticed by an unsuccessful litigant as opposed to a prevailing party. We therefore affirm the district court's award of costs to Crawford for transcript copies of depositions noticed by Gibbons and daily trial transcripts.

C.

Gibbons also appeals the taxing of costs for Crawford's travel expenses and attorney's fees incurred in connection with a deposition taken in Scotland. The district

court based the award upon its general equitable powers, finding bad faith and vexatiousness concerning Gibbons' failure to comply with a discovery order that made the Scotland depositions necessary.

The facts underlying the district court's award can be briefly summarized. Crawford sought to depose two principals of Hydrasun (Aberdeen), Ltd., a Scottish corporation, who allegedly had knowledge of facts concerning the losses claimed by Gibbons. To limit expenses, Crawford had agreed to make one of its Scottish distributors available in the United States in exchange for Gibbons' commitment to make the Hydrasun principals, who resided in Scotland, available to Crawford, in the United States. The Scottish distributor was deposed by Gibbons pursuant to the agreement, but despite repeated attempts by Crawford, Gibbons failed to make available the Hydrasun principals. Crawford then obtained a court order directing Gibbons to make the principals available in the United States pursuant to the original agreement. The principals later appeared in the United States, but their depositions were not completed because they insisted on leaving early for personal reasons. During these depositions, Crawford became aware that the principals had been in the United States to confer with Gibbons prior to the court's order, but were not made available to Crawford at the time. Crawford then requested a hearing before a magistrate who ordered that Crawford be afforded a full and fair opportunity to depose the principals in Scotland and examine documents. Pursuant to the magistrate's order, Crawford sent three attorneys to Scotland to take the depositions, but the principals refused to disclose certain business documents they considered confidential. The scheduled depositions concluded with no testimony taken and no documents produced.

As a general rule attorney's fees and travel expenses incurred in connection with deposition taking, are not usually taxable as costs. 4 J. Moore, W. Taggart & J.

Wicker, *Moore's Federal Practice* ¶ 26.82 (2d ed. 1983). Under circumstances evidencing bad faith, vexatiousness, or oppressiveness, however, an award of such costs may be made under the court's general equitable power. *See Hall v. Cole*, 412 U.S. 1, 5, 93 S.Ct. 1943, 1946, 36 L.Ed. 2d 702 (1973); *United States v. Bexar County*, 89 F.R.D. 391, 394 n. 5 (W.D.Tex.1981); 4 *Moore's Federal Practice* at ¶ 26.82; 6 *Moore's Federal Practice* at ¶ 54.77[2]. In this case the district court expressly found that Gibbons acted vexatiously and in bad faith. The record clearly supports the district court's findings. Gibbons, in fact, completely failed to defend against or even dispute the facts upon which the court's findings were based. We therefore affirm the district court's award of these costs under its general equitable power.

IV

The final and most important issue is the taxing of expert witness fees. The Supreme Court long ago established as a general rule that expert witness fees are not taxable as costs beyond the statutory per diem fee, mileage, and subsistence allowance provided in 28 U.S.C. § 1821. *Henkel v. Chicago, St. Paul, Minnesota, and Omaha Ry Co.*, 284 U.S. 444, 446, 52 S.Ct. 223, 224-25, 76 L.Ed. 386 (1932). The district court here, in a thoughtful and carefully considered opinion, however, decided that the Court modified the general rule when it stated that "the discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute." *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 234-35, 85 S.Ct. 411, 416, 13 L.Ed.2d 248 (1964). The Third and Eighth Circuits have interpreted *Farmer* to accord a district court equitable discretion to award expert witness fees when an expert's testimony is "indipensable" to the determination of the case. *See Paschall v. Kansas City Star Co.*,

695 F.2d 322, 338-39 (8th Cir.1982); *Roberts v. S.S. Kyriakoula L. Lemos*, 651 F.2d 201, 206 (3d Cir.1981). The district court, although recognizing that this circuit, unlike the Third and Eighth circuits, had not formally adopted the indispensability rule, believed that the door to the adoption of this rule had been opened in *Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087 (5th Cir. 1982). In *Copper Liquor*, we stated

> Expert witnesses generally may be allowed only the fees allowed "fact witnesses," as prescribed by 28 U.S.C. § 1821. Courts of appeal have approved trial court discretion to award the full fee charged by the expert in exceptional circumstances, for example, when the expert testimony was necessary or helpful to the presentation of civil rights claims, or indispensable to the determination of the case. If counsel plan to seek allowance of the entire expert's fee, the better practice is to seek court approval before calling the expert witness. The court should consider these factors if counsel seek an allowance for experts in excess of the fee allowed for fact witnesses.

Id. at 1100 (footnotes omitted).

Although this statement in *Copper Liquor*, which is unquestionably dictum, suggests that expert witness fees may be recoverable in certain circumstances, we are compelled to hold otherwise.[1] Like the panel in *Copper Liquor*, we are bound by a prior decision of this court, decided after *Farmer*, that held courts have no authority outside 28 U.S.C. § 1821 to award as costs expert witness fees. *Burgess v. Williamson*, 506 F.2d 870, 879 (5th Cir.

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[1] Even if *Copper Liquor* was controlling and did permit the taxing of expert witness fees, our decision would be no different because Crawford did not seek court approval of the experts' entire fees before calling its expert witnesses. *See Copper Liquor*, 684 F.2d at 1100.

1975); *see also Baum v. United States*, 432 F.2d 85, 86 (5th Cir.1970).[2]

In conclusion we affirm the district court's assessment of all costs except those representing expert witness fees and remand to the district court for a reassessment of costs consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

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[2] Our decision today is not inconsistent with this court's opinion in *Jones v. Diamond*, 636 F.2d 1364, 1384 (5th Cir. 1981) (en banc). In *Jones*, we held that recovery of expert witness fees above the statutory maximum is permitted in civil rights case because of Congress' intent to apply a different rule in such cases and because civil rights plaintiffs, particularly prison inmates who are almost always indigent, would be unable to bring suit without the ability to recover expert's fees. *Id.* These unique considerations have no application in most civil cases such as the one here.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

Civ. No. 79-1127

Section J

J.T. GIBBONS, INC.,
Plaintiff,

—against—

CRAWFORD FITTING COMPANY, *et al.*,
Defendants

MEMORANDUM OPINION

PALMERI, J.

I. BACKGROUND

These cross motions deal with the allowance and disallowance of costs in an antitrust action. The action in question, brought under sections one and two of the Sherman Act, was tried to a jury from November 2, 1981, to November 19, 1981. At the end of the entire case, a directed verdict was entered in favor of defendants on all of plaintiff's claims. Defendants' counterclaim for malicious prosecution, alleging that plaintiff's suit was part of a scheme to wrongfully extort a distributorship from defendant Crawford Fitting Co. ("Crawford"), was submitted to the jury. The jury returned a verdict in favor of plaintiff on the counterclaim.[1] On November 24, 1981,

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[1] The jury answered "yes" to the following interrogatory: "Did Gibbons bring this lawsuit in good faith after full disclosure of the facts within the knowledge of Messrs. Richard and Cecil Keeney to their attorneys?"

judgment was entered dismissing plaintiff's complaint with costs to defendants and dismissing the counterclaim without costs. On December 28, 1981, defendants' motion for judgment notwithstanding the verdict or new trial on the counterclaim was denied.[2]

On May 9, 1983, the Fifth Circuit unanimously affirmed this Court's ruling in all respects. *J.T. Gibbons v. Crawford Fitting Co.*, 704 F.2d 787 (5th Cir.1983). The deadline for petitioning the United States Supreme Court for writs of certiorari passed without the filing of a petition by any party on August 8, 1983, and the judgment entered on November 24, 1981, in defendants' favor became final.

On November 30, 1983, defendant Crawford, on behalf of all defendants, filed its bill of costs, together with a supporting memorandum and documentation. At a hearing before the Clerk of the Court for the Eastern District of Louisiana on December 9, 1983, at which no one appeared on behalf of plaintiff, all costs requested by defendants were taxed with the exception of expert witness fees and attorneys' fees and expenses incurred in connection with a discovery trip to Scotland. The total costs taxed were $57,480.70. The amount of costs denied was $150,480.70.

On December 15, 1983, plaintiff filed a motion to review costs. Plaintiff's motion requests the setting aside of the full amount of costs taxed against it on the grounds (1) that the award of costs was barred under the doctrine of res judicata and collateral estoppel and (2) that defendants' bill of costs was not timely filed. In addition,

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[2] This Court filed two opinions—one granting the defendants' motion for a directed verdict and one denying defendants' motion for judgment notwithstanding the verdict on the counterclaim. *J.T. Gibbons, Inc. v. Crawford Fitting Co., Inc.*, 565 F.Supp. 167 and 186 (E.D. La. 1981).

plaintiff specifically challenges the costs taxed by the clerk for charts, audio-visual aids and transcripts.

On December 16, 1983, defendants filed a motion for review of costs, requesting this Court to exercise its discretion to award the costs denied by the clerk.

II. DISCUSSION

A. *Plaintiff's Motion for Review of Costs*

1. Res judicata and collateral estoppel

Plaintiff contends that principles of res judicata and collateral estoppel preclude the awarding of *any* costs to defendants. Plaintiff claims that the amount sought by defendants as costs was included in defendants' $1,760,000 claim for damages in the counterclaim. Since the jury found against the defendants on the counterclaim, plaintiff argues that defendants may not now "relitigate" the issue of their entitlement to these costs. Plaintiff's argument is frivolous.

In the judgment entered on November 24, 1981, and the decision granting defendants' motion for directed verdict filed on December 4, 1981, the Court dismissed plaintiff's complaint and exercised its discretion under Fed. R. Civ. P. 54(d) to award defendants the costs incurred in defending a legally baseless antitrust suit. Nothing in the decision denying defendants' motion for judgment notwithstanding the verdict on the counterclaim contradicted this directive. In effect, plaintiff now asserts that this Court erred in granting defendants their costs in the main case.

Plaintiff's brief is repleat with decisions enumerating the general principles of res judicata and collateral estoppel. Not one of these decisions applies the doctrines of res judicata or collateral estoppel to deny a litigant its costs. The reason for this is that the doctrines of res judicata and collateral estoppel have no applicability to the issue of costs.

It is true that the doctrine of res judicata percludes a litigant from relitigating issues that were or could have been raised in an earlier action. Here, however, defendants are not "relitigating" anything. No new lawsuit has been filed. Defendants have simply filed a bill of costs pursuant to this Court's order, entered under Fed. R. Civ. P. 54(d), allowing the defendants their costs in the antitrust action. The principles of res judicata have no applicability under such circumstances.

Defendants have not "split" any cause of action. Nothing precluded defendants from excluding the amount requested as costs from the counterclaim and claiming this amount in a separate bill of costs. Moreover, this court is aware of no reason why defendants could not have refrained from filing a counterclaim, collected their costs upon the successful conclusion of the antitrust action and then filed a malicious prosecution lawsuit against plaintiff for their other expenses. The fact that defendants chose to include their demand for costs, as well as other expenses, in their counterclaim, upon which the jury found against them, does not deprive defendants of their entitlement to a discretionary award of costs under Fed. R. Civ. P. 54(d) in the main case. The jury had no power to deprive defendants of this right.[3] Additionally, it is noteworthy that the damages sought by the defendants on their counterclaim far exceeded any costs in the case. They sought reimbursement of legal expenses incurred by them up to that point and which exceeded one and one-half million dollars.

In short, plaintiff's contention that principles of res judicata and collateral estoppel preclude an award of any costs to defendants in this case is nothing short of frivolous.

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[3] The counterclaim was submitted to the jury on the same evidence as that on which the Court based its decision to grant directed verdicts on the antitrust claims. The presentation of the counterclaim involved no additional evidence.

2. Timeliness of bill of costs

Plaintiff claims that defendants' delay in filing its bill of costs completely bars taxation of costs against plaintiff. Plaintiff argues that to permit defendants to recover costs now would violate the directive of Fed. R. Civ. P. 1 that the Federal Rules "be construed to secure the just, *speedy*, and inexpensive determination of every action." (Emphasis added). Plaintiff further contends that it has been prejudiced by the filing of the bill of costs at this time.

Judgment was entered in this case on November 24, 1981. The Fifth Circuit rendered its opinion of affirmance on May 9, 1983, and the deadline for the filing of a petition for certiorari passed on August 8, 1983. The bill of costs herein was filed on November 30, 1983.

Rule 54(d) does not place any time limits upon the filing of a bill of costs, and the determination of whether the taxation of costs in a particular case is time-barred lies entirely within the discretion of the trial court. It is true that Rule 54(d) must be interpreted in light of the mandate of Rule 1 that the Federal Rules be construed to secure the just, *speedy*, and inexpensive determination of every action. Thus, a delay in the filing of a bill of costs which the trial court determines to be unreasonable would lead to the denial of the taxation of costs. This, however, is not such a case.

The cases cited by plaintiff are not in point. The case of *United States v. Pinto*, 44 F.R.D. 357 (W.D. Mich. 1968), where a delay of almost four years in filing a bill of costs was held to violate Rule 1, involved a simple consent judgment from which no appeals followed. In *Woods Construction Co. v. Atlas Chemical Industries, Inc.*, 337 F.2d 888, 891 (10th Cir.1964), a local rule required the filing of a bill of costs within 10 days after the entry of judgment. In contrast, this case is not governed by any local rule and involved an appeal to the Fifth Circuit and

a possible petition for certiorari to the United States Supreme Court. The facts in this case are closer, although even more favorable to defendants here, to those in *United States v. Hoffa*, 497 F.2d 294 (7th Cir.1974). In *Hoffa*, costs of prosecution [4] were taxed to defendants where a bill of costs had been filed within one year of the entry of final judgment in the case. The Seventh Circuit noted that the circumstances of the particular case must be considered in determining whether the delay is reasonable and that:

> [w]hile eight years is obviously a long time, nevertheless—in view of the complicated nature of the case, the series of appeals encompassing seven years, the fact that the bill was filed within one year after the final culmination of the case, the obvious situation that the costs were not going to be paid until every appellate avenue had been exhausted, and the absence of a local rule—we are unable to say the delay violates Rule 1. Therefore, the district court did not abuse its discretion in taxing costs to appellants.

Id. at 296.

The bill of costs in this case was presented within six months after the Fifth Circuit's decision in this case and within four months after the passing of the deadline for the filing of a petition for certiorari. Such a delay cannot, in the absence of exceptional circumstances, be considered unreasonable.

Plaintiff claims that it has been prejudiced by the defendants' delay in filing its bill of costs. However, the plaintiff has not described the manner in which it has been prejudiced, and this Court is unable to discern any basis for this claim.[5] Under the circumstances, this Court

[4] The rules for the imposition of costs in criminal cases are the same as in civil cases. *Id.* at 296.

[5] Plaintiff intimates that it would be prejudiced by the unavailability of the trial judge to decide its motion. This concern has proved unfounded.

finds no unreasonable delay on the part of the defendants in filing their bill of costs.

3. Specific items to which plaintiff objects.

a. *Charts and audio-visual aids*

Plaintiff objects to the award of costs for charts and audio-visual aids. These charts and audio-visual aids were the following:

Four charts were prepared by L.R. Langard concerning the sale of Craword's products in the North Sea area. These charts were essential to refute plaintiff's claim of lost sales in that market.[6] The charts were introduced into evidence, and, although they were shown to the jury in connection with expert testimony, they were not merely illustrative of such testimony, but had independent significance. *See* 6 *Moore's Federal Practice* ¶ 54. 77[6] at 1741.

Falls Advertising Co. ("Falls") was retained by defendants to provide essential audio-visual assistance, including preparation of charts depicting defendants' organization and distribution scheme. This distribution scheme, attacked by plaintiff as anti-competitive, was the focal point of the litigation. A clear understanding of this scheme was essential and the use of charts exemplifying it was necessary to the proper presentation of defendants' case. Falls also provided a projector and screen which were used by both defendants and plaintiffs during the testimony to enlarge and display simultaneously to the Court, the jury, and the witness, key documents in the case. Without this aid, the handling of exhibits would have been time consuming and possibly confused. Indeed, the Court had requested the use of such a device prior to trial as a means of shortening the trial time and facilitat-

[6] Each of the charts for which costs are sought were listed in the pretrial order entered pursuant to Fed. R. Civ. P. 16.

ing the presentation of voluminous documentary evidence. Both these purposes were fully served at trial.

Falls provided other necessary services. Prior to the litigation, Richard M. Keeney, president of plaintiff, undertook to make extensive tape recordings of conversations he initiated with various defendants concerning his alleged inability to obtain Crawford products.[7] Falls worked extensively with the tapes, filtering them to make them easily understandable and devising an access system. These tapes were introduced as evidence in the case. The evidentiary value of these tapes was significantly enhanced by Falls efforts.

This case involved a variety of alleged antitrust violations. The issues involved in these various allegations would have been very difficult for a jury to resolve, and these inherent difficulties were exacerbated by the complex corporate organization and distribution structure of defendant Crawford and its numerous independent distributors. To prevent plaintiff from exploiting the high probability of jury confusion in this case, it was necessary for defendants to prepare and use at trial the charts and audio-visual aids described above. This case would not have been fairly and efficiently tried before the jury without the benefit of the charts and audio-visual aids for which costs are sought here.

In some courts, the costs challenged by plaintiff are allowable under 28 U.S.C. § 1920(4).[8] *See* 6 *Moore's Federal Practice* ¶ 54.77[6] at 1739 and cases cited at n. 10. ("The reasonable expense of preparing maps, charts, graphs, photographs, motion pictures, photostats and kindred materials is taxable as costs under § 1920(4) when necessarily obtained for use in the case.") The

[7] *See J.T. Gibbons, Inc. v. Crawford Fitting Co., Inc.*, 565 F.Supp. at 177 n.6 (E.D. La. 1981) (regarding substance of taped conversations.)

[8] *See* note 15 *infra* for text of 28 U.S.C. § 1920.

Fifth Circuit, however, has taken a restrictive view of the materials covered under this provision, holding in *Johns Manville Corp. v. Cement Asbestos Products Co.*, 428 F.2d 1381, 1385 (5th Cir. 1970), that "[t]here is no statutory provision for the taxation of charts and exhibits as costs." Given this view of the law, it appears that none of the costs requested by defendants under 28 U.S.C. § 1920(4) can be awarded pursuant to that statute. A trial court has equitable discretion, however, to award costs not specifically provided for by statute. *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 235 (1964); *Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1099 (5th Cir. 1982); *Roberts v. S.S. Kyriakoula D. Lemos*, 651 F.2d 201, 206 (3rd Cir. 1981). The Fifth Circuit impliedly acknowledged this principle in *Johns Manville*, but disallowed an award of costs for charts and exhibits because no prior court approval had been obtained for the production of such materials. *Johns Manville*, 428 F.2d at 1385. *Accord Studiengesellschaft Kohle v. Eastman Kodak*, 713 F.2d 128, 133 (5th Cir. 1983) (en banc); *United States v. Bexar County*, 89 F.R.D. 391 (W.D. Tex. 1981); *Hiller v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 60 F.R.D. 87, 90 (N.D. Ga. 1973).

Given the necessity at trial for the charts and audio-visual aids for which costs are sought here and the complexity of the case involved, this Court would, were it writing on a clean slate, grant defendants these costs. In view of the absence of prior court approval, however, the Court is constrained by the law of the Fifth Circuit, as set forth in the *Johns Manville* case, to deny costs for all of these items except one—the costs for the operation by Falls of the screen and projector and for the preparation of slides for use in connection therewith. Although no mention was made of costs at the time, the Court considers that its own request prior to trial is tantamount to prior court approval of these expenditures. This equip-

ment undoubtedly shortened the trial and facilitated the use of documentary evidence. Under the circumstances, the Court would regard it as inequitable to disallow these costs.

In sum, all costs for charts and audio-visual aids are reluctantly denied with the exception of those costs associated with the operation by Falls of the screen and projector and the preparation of slides for use at trial.[9]

b. *Transcripts*

Plaintiff objects to the taxing of costs for transcripts of depositions and daily trial transcripts.

Charges of the court reported for transcripts reasonably necessary for use in the case are recoverable as costs under 28 U.S.C. § 1920.[10] Plaintiff acknowledges that defendants may be entitled to costs for transcripts of depositions noticed by defendants. Plaintiff contends, however, that defendants are not entitled to costs for copies of depositions noticed by *plaintiff*. Plaintiff cites two cases in support of this proposition. The first case, *Kane v. Martin Paint Stores, Inc.*, 439 F.Supp. 1054 (S.D.N.Y. 1977), *aff'd without opinion*, 578 F.2d 1368 (2d Cir. 1978), does not appear to support plaintiff's argument. The *Kane* court did disallow costs for depositions noticed by the losing party. However, the disallowance rested on the ground that the losing party had paid for these depositions, and thence "represented no expense to" the prevailing party. *Id.* at 1059. Defendants herein do not seek costs *plaintiff* incurred in taking the depositions, but rather merely their *own* costs in obtaining for their own use *copies* of depositions notice by plaintiff. The logic of the *Kane* case is therefore inapplicable here.

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[9] The Court has reviewed the supplemental affidavit of Mr. David Shea, and finds that the amount of $18,494.28 was reasonably expended by defendants in connection with the operation of the projector and screen and the preparation of slides for use at trial.

[10] *See* note 15 *infra* for text of 28 U.S.C. § 1920.

The other cases cited by plaintiff, *Electronic Specialty Co. v. International Controls Corp.*, 47 F.R.D. 158 (S.D.N.Y. 1969), along with several other district court decisions cited by Professor Moore in his federal practice treatise, *see* 6 *Moore's Federal Practice* ¶ 54.77[4] at 1724 n.21, does appear to support plaintiff's contention. Other, more persuasive authority does not, however, support plaintiff's position. In *SCA Services, Inc. v. Lucky Stores*, 599 F.2d 178, 181 (7th Cir. 1979), the Seventh Circuit held that "[T]he expense of deposition copies reasonably necessary for use in the case may be included in the award of costs" and that this rule "applies to copies of both an *opponent's* and the prevailing party's own depositions." *Accord Murphy v. Amoco Production Co.*, 588 F.Supp. 591, 594 (D.N.D. 1983), *aff'd on other grounds*, No. 83-1533, slip op. (8th Cir. March 6, 1984); *Principe v. McDonald's Corp.*, 95 F.R.D. 34, 37 (E.D. Va. 1982). The Seventh Circuit relied heavily on the reasoning of a Fifth Circuit case, *United States v. Kolesar*, 313 F.2d 835 (5th Cir. 1963), which, although not specifically addressing the issue whether costs are taxable for copies of an opponent's as well as a prevailing party's deposition, directly supports the rule adopted in *SCA Services, Inc.* *See United States v. Kolesar*, 313 F.2d 838-40. *See also Copper Liquor, Inc. v. Adolph Coors Company*, 684 F.2d 1087, 1099 (5th Cir. 1982) (reaffirming *Kolesar) reconsidered en banc*, 701 F.2d 542 (5th Cir. 1983) (relevant holding undisturbed). The Seventh Circuit noted:

> Attorney's offices are often distant from the courthouse where the original transcript of the deposition is filed; but, even if they are not, the practicalities of preparing a case for trial often require that the attorneys have frequent and ready access to the depositions, and that they be able to mark annotations and cross-references on the pages.

SCA Services, Inc. v. Lucky Stores, 599 F.2d at 181. This reasoning is essentially the same as that of the Fifth Circuit in *Kolesar*, and, as the Seventh Circuit recognized, is equally applicable to depositions noticed by losing parties as to those noticed by prevailing parties. This Court declines, therefore, to deny defendants costs for copies of certain depositions solely on the ground that such depositions were noticed by plaintiff rather than by defendants.

Plaintiff further contends that transcripts of depositions obtained merely for defendants' convenience are not taxable as costs and that "[d]efendants' memo is significantly lacking in specifics regarding the necessity of deposition transcripts [they] obtained for use in this case."

Costs may be taxed under 28 U.S.C. § 1920 (2) for deposition transcripts "necessarily obtained for use in the case." 28 U.S.C. § 1920 (2). A deposition need not be used at trial to be taxable. *Electronic Specialty Co. v. International Controls Corp.*, 47 F.R.D. at 162. Rather, such depositions are taxable as long as "the taking of the deposition is shown to have been reasonably necessary in the light of facts known to counsel at the time it was taken." *Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1099 (5th Cir. 1982). Depositions which are merely investigative in nature are not taxable. 6 *Moore's Federal Practice* ¶ 54.77[4] at 1723; *Electronic Specialty Co. v. International Controls Corp.*, 47 F.R.D. at 167. However, the trial court has broad discretion to allow such costs and the burden is on the losing party to show the impropriety of taxing a particular deposition as a cost. *See Principe v. McDonald's Corp.*, 95 F.R.D. at 36; *Meder v. Everest & Jennings, Inc.*, 553 F.Supp. 149, 150 (E.D. Mo. 1982); *Ingersoll Milling Machine Co. v. Otis Elevator Co.*, 89 F.R.D. 433, 435 (N.D. Ill. 1981). "Unless the opposing party interposes a specific objection that a deposition was improperly taken or unduly pro-

longed, deposition costs will be taxed as having been 'necessarily obtained for use in the case' within the meaning of 28 U.S.C. § 1920." *Meder v. Everest & Jennings, Inc.*, 553 F.Supp. at 150. *Accord George R. Hall, Inc. v. Superior Trucking Co.*, 532 F.Supp. 985, 994 (N.D. Ga. 1982); *Federal Savings & Loan Insurance Corp. v. Szarabajka*, 330 F.Supp. 1202, 1210 (N.D. Ill. 1971). Plaintiff, in contending that defendants have failed to properly justify the taxation of depositions in this case, fails to recognize that it is *its* burden to demonstrate that the depositions should *not* be taxed. Plaintiff has not advanced any reason why any of the depositions at issue here should not be taxed and has thus totally failed to meet this burden.

Moreover, defendants have adequately demonstrated in their initial and supplemental memoranda and affidavits in opposition to plaintiff's motion [10a] that all the depositions at issue here were necessary for use in the antitrust case. Depositions which are introduced into evidence at trial or used during cross-examination are "necessary for use in the case." The depositions of the following witnesses were introduced in whole or in part into evidence and/or used for purposes of cross-examination at the trial of the antitrust case: Simon Thornhill, Bernard Pemberton, Richard Keeney, Irving B. Ozanne, and Wilbur Daigle.

Other depositions, although not introduced into evidence or used during cross-examination, were necessary for use in the antitrust case in light of the facts known at the time they were taken. The depositions of the following persons fall into this category: Michael Kenney, Ken Rolfs, Morris Forsythe, James Sullivan, Clifton Ryan, Robert Douran, Henry Dauterive, David Schaub, Ralph Fishman, and Cecil Kenney.

[10a] All the affidavits and the supplemental memorandum requested by the Court from defendants have been served upon plaintiff. Plaintiff has informed the Court that it does not wish to respond to any of these papers.

Michael Keeney was part owner and vice president of plaintiff and thus was intimately acquainted with its operations, including whether or not plaintiff had a source of supply for values and fittings.

Ken Rolfs and Morris Forsythe were employees of plaintiff responsible for taking orders from customers and placing orders with suppliers. Each had knowledge of plaintiff's purchases and sale of valves and fittings from defendants and from other manufacturers of valves and fittings. This knowledge was relevant to the boycott issue of whether plaintiff had a source of supply of valves and fittings and also to the definition of the market as being broader than Crawford's products. Moreover, Mr. Forsythe had knowledge of the shipping practices of plaintiff, a key issue in this suit.

James Sullivan and Clifton Ryan were both employees of plaintiff involved in export sales. As recounted in plaintiff's witness list, each had knowledge of the operation of plaintiff's business, plaintiff's relations with customers and suppliers and the purchase and sale by plaintiff of products lines.

Robert Douran and Henry Dauterive were both potential trial witnesses who did accounting work for plaintiff. As stated in the pretrial order, each had knowledge of the costs and profitability of plaintiff, including its values and fitting business, and the damages claimed by plaintiff as a result of the alleged unlawful conduct of defendants.

Cecil Keeney, the father of plaintiff's owners, David Schaub, one of the attorneys initially retained by plaintiff in connection with this case and Ralph Fishman, another of the attorneys first retained by plaintiff, were involved in negotiations with defendant Crawford regarding an alternate source of supply of Crawford products during the time plaintiff claimed it was being subjected to an antitrust boycott. Their depositions were taken in order

to help defendants prepare to defend plaintiff's boycott claim.[11]

Each of the above persons was a potential trial witness at the time of trial, as confirmed by their having been listed as "will call" or "may call" witnesses in the pretrial order.

The Court finds that the depositions of the above persons were necessarily obtained for use in the case. Furthermore, given the complexity and size of the case, the Court finds that *copies* of all deposition transcripts were also necessarily obtained. *See Studiengesellschaft Kohle v. Eastman Kodak*, 713 F.2d 128, 134 (5th Cir. 1983); *Capra, Inc. v. Ward Foods, Inc.*, 567 F.2d 1316, 1323 (5th Cir.1978), *overruled on other grounds, Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542 (5th Cir. 1983) (en banc).[12]

In sum, all deposition costs requested by defendants are allowed.

Plaintiff also challenges the award of costs for daily trial transcripts. Given the complexity of the case, the amount claimed, and the length of the trial, daily transcripts must be regarded as having been necessarily obtained for use in the case, and costs for such daily transcripts must be allowed. Plaintiff argues, however, that defendants are not entitled to only "their share" of such costs, without anywhere explaining what the term "their share" means.

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[11] David Schaub and Ralph Fishman were called in plaintiff's case in chief.

[12] Although the Court finds, given the complexity of the case, that all counsel had need for copies of the deposition transcripts at issue here, the Court notes that it would be particularly unjust to have expected defendants' trial counsel, who resided in Cleveland, Ohio, to have traveled to the courthouse in New Orleans whenever he needed to use a deposition transcript.

Defendants have supplied an affidavit and supporting documentation to the effect that they paid $26,607.00 for daily trial transcripts. The sum is reasonable and this is the amount to which defendants are entitled.

B. *Defendants' Motion for Review of Costs* [13]

1. Expert witness fees

Rule 54(d) of the Federal Rules of Civil Procedure provides that, in the absence of other statutory authority, "costs shall be allowed as of course to the prevailing party, unless the court otherwise directs." The issue here is whether defendants are entitled to the amount requested as costs for expert witness fees.

It is clear that not all expenses incurred by a party in connection with a lawsuit constitute recoverable costs. Generally, courts award only those costs specifically enumerated by statute, rule of court, or in the custom, practice or usage of a particular district.[14] *See* 6 *Moore's Federal Practice* ¶ 54.77[1] at 1701 (2d ed. 1983).

The basic statutory enumeration of allowable costs is 28 U.S.C. § 1920.[15] Among the expenses taxable as costs

[13] It should be noted that plaintiff specifically objects to the awarding of costs for expert witness fees or expenses of the Scotland deposition.

[14] The Court understands that it is the general policy of the Clerk of the Court for the Eastern District of Louisiana not to tax expert witness fees as costs.

[15] Section 1920 provides:

A judge or clerk of any court of the United States may tax as cost the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

under this statute are "fees and disbursements for . . . witnesses." The general rule, however, is that expert witness fees are not taxable as costs beyond the statutory per diem fee, mileage, and subsistence allowance provided for under 28 U.S.C. § 1821.[16] *Henkel v. Chicago, St. Paul,*

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

28 U.S.C. § 1920.

[16] Section 1821 provides in relevant part:

(a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.

(b) A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid for the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the begining and end of such attendance or at any time during such attendance.

(c)(1) A witness who travels by common carrier shall be paid for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled to and from such witness's residence by the shortest practical route in going to and from such witness's residence by the shortest practical route in going to and returning from the place of attendance. Such a witness shall utilize a common carrier at the most economical rate reasonably available. A receipt or other evidence of actual cost shall be furnished.

(2) A travel allowance equal to the mileage allowance which the Administrator of General Services has prescribed, pursuant to section 5704 of title 5, for official travel of employees of the Federal Government shall be paid to each witness who travels by privately owned vehicle. Computation of mileage under this paragraph shall be made on the basis of a uniformed table of distances adopted by the Administrator of General Services.

(3) Tool charges for toll roads, bridges, tunnels and ferries, taxicab fares between places of lodging and carrier terminals, and park-

Minnesota & Omaha Railway Co., 284 U.S. 444, 446 (1932); *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981); *Burgess v. Williamson*, 506 F.2d 870, 879 (5th Cir. 1975); *Baum v. United States*, 432 F.2d 85, 86 (5th Cir. 1970); *United States v. Kolesar*, 313 F.2d 835, 837 (5th Cir. 1963); *Green v. American Tobacco Co.*, 304 F.2d 70, 77 (5th Cir. 1962); 6 *Moore's Federal Practice* ¶ 54.77[5.-3] at 1734 (2d ed. 1983); 10 Wright & Miller, *Federal Practice and Procedure, Civil* § 2678

Several exceptions to this general rule have developed, however. Fees for court-appointed experts may be taxed as costs beyond the statutory subsistence and travel allowance. 28 U.S.C. § 1920(6); *Worley v. Massey-Ferguson, Inc.*, 79 F.R.D. 534, 540 (N.D. Miss. 1978). Expert witness fees may be taxed as costs in some cases where "the court is satisfied that the situation is exceptional *and the court makes an order* to that effect *prior to the expert being called.*" 6 *Moore's Federal Practice* ¶ 54.77[5.-3] at 1735 (2d ed. 1983) (citation omitted) (emphasis added). In diversity cases, expert witness fees may be taxed as costs when state law so provides. *Henning v. Lake Charles Harbor & Terminal District*, 387

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ing fees (upon presentation of a valid parking receipt), shall be paid in full to a witness incurring such expenses.

(4) All normal travel expenses within and outside, the judicial district shall be taxable as costs pursuant to section 1920 of this title.

(d) (1) A subsistence allowance shall be paid to a witness (other than a witness who is incarcerated) when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day. 28 U.S.C. § 1821.

(2) A subsistence allowance for a witness shall be paid in the amount not to exceed the maximum per diem allowance prescribed by the Administrator of General Services, pursuant to section 5702 (a) of title 5, for official travel in the area of attendance by employees of the Federal Government.

28 U.S.C. § 1821.

F.2d 264, 267 (5th Cir. 1969). A recent trend has been to allow the taxation of expert witness fees beyond the statutory allowance in civil rights cases. *Barry v. McLemore*, 670 F.2d 30, 34 (5th Cir. 1982); *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981). Authority for such taxation of expert witness fees has been found in congressional intent to encourage the initiation of civil rights actions.

None of the exceptions set forth above apply in the instant case,[17] and defendants do not attempt to invoke any of these theories. Rather, defendants rely on a rule recently adopted by the Third and Eighth Circuits which holds that district courts have equitable discretion to award expert witness fees exceeding the statutory allowance whenever the expert's testimony is indispensable to the determination of the case. *Roberts v. S.S. Kyriakoula D. Lemos*, 651 F.2d 201, 206 (3rd Cir. 1981); *Paschall v. Kansas City Star Co.*, 695 F.2d 322, 338-39, (8th Cir. 1982), *rev'd on other grounds*, Nos. 81-1963 and 82-1390, slip op. (Feb. 6, 1984) (en banc); *Welsh v. Likins*, 68 F.R.D. 589, 596-97 (D. Minn.), *aff'd* 525 F.2d 987 (8th Cir. 1975) (affirmed per curiam on basis of district court's opinion). *See also Shakey's Inc. v. Covalt*, 704 F.2d 426, 437 (9th Cir. 1983) (denying costs for expert witness fees, but implying that the "indispensability" rule is valid in the Ninth Circuit). This rule has been specifically rejected by the District of Columbia Circuit. *Quy v. Air America, Inc.*, 667 F.2d 1059, 1066-1068 (D.C. Cir. 1981). *See also Illinois v. Sangamo Construc-*

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[17] Expert witness fees beyond the statutory limitation have also been awarded "when an unfounded action or defense is maintained in bad faith, vexatiously, wantonly, or for oppressive reasons." *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 441 F.2d 631, 637 (5th Cir.), *cert. denied*, 404 U.S. 941 (1971). Despite the utter baselessness of plaintiff's antitrust claims in this case, as set forth in the Court's earlier opinions, the jury verdict on the counterclaim would appear to preclude reliance upon this theory for the awarding of expert witness fees in this case. *See* note 1 *supra*.

tion Co., 657 F.2d 855, 864-865 (7th Cir. 1981) (strict rule limiting expert witness fees to statutory allowance, but no specific discussion of indispensability rule).

In rejecting the indispensability rule, the District of Columbia Circuit relied on the Supreme Court's decision in *Henkel v. Chicago, St. Paul, Minnesota & Omaha Railway Co.*, 284 U.S. 444 (1932). The Court stated:

> Under [the predecessor statute to § 1821] additional amounts paid as compensation, or fees, to expert witnesses cannot be allowed or taxed in cases in the federal courts. The Congress has dealt with the subject comprehensively and has made no exception of the fees of expert witnesses.

Id. at 446.[18]

Both the Third and Eighth Circuits have held, however, that a subsequent Supreme Court case, *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964), qualified *Henkel* so as to allow district courts discretion to award experts' fees as costs when expert testimony is indispensable to the resolution of the case. *Roberts v. S.S. Kyriakoula D. Lemos*, 651 F.2d at 203-06; *Paschall v. Kansas City Star Co.*, 695 F.2d at 338-39. In *Farmer*, the Supreme Court upheld a district court's refusal to tax travel expenses and stenographer's fees as costs, under circumstances in which the district judge found that the prevailing party had deliberately run up a "huge bill of costs." The Supreme Court held:

> We think that under the circumstances [the district judge] could not be charged with any improper exercise of the discretion vested in him by Rule 54(d). We do not regard that Rule as giving district judges unrestrained discretion to tax costs to reimburse a winning litigant for every expense he has seen fit to incur in the conduct of his case. Items

[18] It should be noted that the Supreme Court has never had occasion to construe the current versions of 28 U.S.C. §§ 1821 and 1920.

> proposed by winning parties as costs should always be given careful scrutiny. . . . Therefore the discretion give district judges to tax costs should be sparingly exercised *with reference to expenses not specifically allowed by statute.* Such a restrained administration of the Rule is in harmony with our national policy of reducing insofar as possible the burdensome cost of litigation.

Farmer, 379 U.S. at 235 (emphasis added).

In *Paschall*, the Eighth Circuit held that this language in *Farmer* "authorizes district judges to award costs not specifically enumerated in 28 U.S.C. § 1821." *Paschall*, 695 F.2d at 338. The Eighth Circuit went on to hold that this language affords district courts discretion to award expenses for expert witness fees when expert testimony is "crucial" or "indispensable" to the determination of the case. *Id.* at 339.

The Third Circuit also found authority for the indispensability rule in the *Farmer* opinion. After quoting the language from *Farmer* relied on by the Eighth Circuit in *Paschall*, Judge Gibbons wrote:

> Farmer appears to hold that Rule 54(d) authorizes district judges to exercise discretion—albeit "sparing"—to award costs not specifically enumerated in § 1821. The Court seemed concerned to avoid taxation of unnecessary and possibly vexatious costs accumulated by a prevailing party. Hence the reference to a national policy in favor of restrained award of costs. It is important to note that the Court based its interpretation of Rule 54(d) not on a *Henkel*-like theory of statutory preclusion of costs not listed in § 1821, but on policy considerations militating against award of unenumerated costs. A district court should therefore carefully scrutinize the prevailing party's bill of costs in order to assure that any award will compensate only those expendi-

tures necessary to the litigation. While Farmer commands perhaps a tight-fisted exercise of discretion in order to insure moderation in the cost of litigation, it does not mandate parsimony to the extent of precluding recovery of legitimate and indispensable litigation expenditures.

We therefore agree with the District of Minnesota and the Eighth Circuit that Farmer affords a district court equitable discretion to award expert fees when the expert's testimony is indispensable to determination of the case.

Roberts v. S.S. Kyriakoula D. Lemos, 651 F.2d at 206 (Footnote omitted).[19]

Although the Fifth Circuit has long adhered to the basic rule that expert witness fees are generally not taxable as costs beyond the statutory allowance, this Circuit has never had occasion to pass specifically on the validity of the indispensability rule adopted by the Third and Eighth Circuits. Moreover, the only Fifth Circuit case specifically mentioning the indispensability rule appears to leave the door open to its application in this Circuit:

> Expert witnesses generally may be allowed only the fees allowed "fact" witnesses, as prescribed by 28 U.S.C. § 1821. Courts of appeal have approved trial court discretion to award the full fee charged by the expert in exceptional circumstances, for example, when the expert testimony was necessary or helpful to the presentation of civil rights claims, *or indispensable to the determination of the case.* [citing *Roberts and Weis v. Likins.* If counsel plan

[19] Although the district court from which the appeal in *Roberts* was taken had a local rule granting the court discretion to award expert witness fees when the expert testimony was crucial to the resolution of the issues in the case, it is clear that the Third Circuit's holding with respect to district court's discretion to award expert witness fees was not dependent on this local rule.

> to seek allowance of the entire expert's fee, the better practice is to seek court approval before calling the expert witness. The court should consider these factors if counsel seek an allowance for experts in excess of the fee allowed for fact witnesses.

Copper Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087, 1100 (5th Cir. 1982) (citations omitted) (emphasis added). *reconsidered en banc*, 701 F.2d 542 (5th Cir. 1981) (relevant language undisturbed).[20]

Furthermore, the *Copper Liquor* Court specifically embraced the view stated by Judge Gibbons in *Roberts* that the Supreme Court in *Farmer* acknowledged the equitable discretion of trial courts to award costs not specifically enumerated by statute. *Id.* at 1099. In this connection, the Fifth Circuit stated that expenditures other than those provided for by statute "may be taxed as costs in exceptional cases presenting unusual equitable considerations in order to achieve justice." *Id.*[21]

[20] Surprisingly, this case was not cited by defendants on this issue.

The Court has considered the fact that no prior approval was sought for the expenses at issue here. The Court notes, however, that the *Copper Liquor* Court did not establish lack of prior approval as an absolute bar to the awarding of expert witness fees as costs, as did the court in *John Mansville* with respect to charts and exhibits. Under the circumstances of this case, the Court does not feel that the lack of prior approval requires the denial of these costs.

[21] A district court in this Circuit has repeatedly indicated its approval of the rule that expert witness fees may be awarded as costs where the expert's testimony is indispensable to the presentation of the prevailing party's case, although it has sometimes declined to award such fees under the specific circumstances of a particular case. *Worley v. Massey-Ferguson, Inc.*, 79 F.R.D. 534, 541 (N.D. Miss. 1978), *citing with approval Yarbrough v. Town of Ackerman*, Civil Action No. EC 75-163-K (N.D. Miss. Feb. 25, 1977); *Brooks v. Town of Sunflower*, Civil Action No. GC 71-57-K (N.D. Miss. Mar. 27, 1975) (cited and distinguished in *Worley, supra*). *See also Pate v. General Motors Corp.*, 89 F.R.D. 342, 344

In view of the Fifth Circuit's statement in *Copper Liquor* and the absence of any specific disavawal of the indispensability rule by this Circuit, the Court considers itself free to adopt the persuasive reasoning of the Third Circuit in *Roberts* and the Eighth Circuit in *Paschall*. This Court believes that the Third Circuit in *Roberts* and the Eighth Circuit in *Paschall* properly construed *Farmer* as having modified the *Henkel* rule so as to grant district courts discretion to award as costs "legitimate and indispensable litigation expenses," including expert witness fees, beyond those specifically provided for by statute.[22] *Roberts*, 651 F.2d at 206. It is particularly appropriate to award defendants the costs of indispensable expert witness testimony under the circumstances of this case, where defendants were forced to defend an extremely burdensome, vexatious, and totally meritless array of antitrust claims.[23]

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n. 2 (N.D. Miss. 1981) (stating that the general rule against the taxing of expert witness fees beyond the statutory allowance "is not inflexible," and that "[u]nder unusual, exceptional or extraordinary circumstances, in the interest of justice and fair play, expert witness fees may be allowable as part of costs"); *Wade v. Mississippi Cooperative Extension Service*, 64 F.R.D. 102, 105 (N.D. Miss. 1974) (citing and distinguishing *Brooks, supra*).

[22] Even the District of Columbia Circuit, in rejecting the indispensability rule, acknowledged that the awarding of expert witness fees beyond the statutory amount would be appropriate under "exceptional circumstances." *Quy v. Air America, Inc.*, 667 F.2d at 1066. Despite the jury verdict against defendants on the counterclaim, the utter baselessness of plaintiff's antitrust claims and the existence of considerable evidence in the record indicating that plaintiff was using this litigation to obtain a Louisiana distributorship, may well constitute "exceptional circumstances" so as to allow the awarding of costs for expert witness testimony under the standard adopted by the District of Columbia Circuit.

[23] Additionally, to became apparent during the trial that defendants had been subjected to abusive documentary discovery, costing they very considerable expense and inconvenience, and that plaintiff had made scant use of this discovery.

The question now becomes, then, whether the expert testimony fees for which defendants seek reimbursement were "crucial" or "indispensable" to the presentation of their case. Defendants seek an award of costs for the fees of three expert witnesses—Dr. Thomas R. Saving, Dr. Phillip R. Roberts, and Mr. James C. Boland.

Dr. Thomas R. Saving is an expert economist who testified to the competitive impact of the practices challenged by plaintiff. Dr. Saving analyzed the economic impact of defendant Crawfcrd's organizational scheme, the territorial restrictions imposed by Crawford on its distributors, the five percent commission-sharing program for extra-territorial sales, and the exchange rate adjustments made by Crawford during 1978—all matters challenged as "anticompetitive" by plaintiff. As the Eighth Circuit noted in *Paschall*, 695 F.2d at 339, issues of economic impact are crucial in antitrust cases, and Dr. Saving's testimony was indispensable to the determination of such issues in the case. Indeed, this Court relied heavily on Dr. Saving's market and currency analysis in deciding defendants' motions for directed verdicts.[24]

Dr. Phillip R. Robers, a partner with the independent public accounting firm of Ernst & Whinney, also supplied evidence crucial to the defense of plaintiff's group boycott claim. Dr. Robers' testimony established that not only was plaintiff undamaged by its inability to obtain products from deefndant Capital Value, but that it actually reecived better delivery times and rates from another supplier after its discontinuance by Capital. His testimony was clearly necessary to this Court's determination that plaintiff had failed to prove any injury. The lack of injury was central to the decision to grant directed ver-

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[24] *See J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 565 F.Supp. at 180, 183, 185 n. 15.

dicts in defendants' favor and was relied on by the Fifth Circuit in affirming that ruling.[25]

Mr. James C. Boland, also of the Ernst & Whinney firm, testified about plaintiff's claim of lost profits arising out of defendants' alleged refusal to deal. Mr. Boland testified that an extensive review of plaintiff's financial data revealed that plaintiff actually lost money on its exportation of valves and fittings. Mr. Boland's testimony would have been crucial on the issue of plaintiff's damages had plaintiff's claims been allowed to go to the jury. The quantum of damages became irrelevant, however, upon the disposition of the case by directed verdicts in defendants' favor. Moreover, this Court specifically declined to rely on Mr. Boland's testimony in reaching its decision to grant directed verdicts. *See* 565 F.Supp. at 181. Nor was his testimony relied upon by the Fifth Circuit in affirming this Court's decision. Under these circumstances, Mr. Boland's testimony cannot be regarded as indispensable, and costs for his testimony are therefore denied.

In sum, the expert testimony of Drs. Saving and Robers was crucial and indispensable to the presentation of defendants case. Mr. Boland's testimony cannot be so regarded. Additionally, and upon review of the documentation submitted in support of defendants' bill of costs, the Court determines that the amounts requested for Drs. Saving's and Rober's testimony are reasonable. The amounts so requested are hereby allowed.

2. Scotland deposition

Defendants ask this Court to exercise its equitable discretion to award them as costs the expenses and attorney's fees incurred in connection with a journey to Scot-

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[25] *See J.T. Gibbons v. Crawford Fitting Co.*, 704 F.2d at 793 n. 4, 565 F.Supp. at 180.

land to take certain depositions. The circumstances surrounding this journey are as follows.

Hydrasus (Aberdeen) Ltd. was the customer in Aberdeen, Scotland to whom plaintiff exports products it purchased from defendant Crawford's distributors. Early in the course of discovery, plaintiff represented that Hydrasun had knowledge of facts at issue, and particularly the alleged losses claimed by plaintiff as a result of the alleged boycott. Moreover, Hydrasun formally assigned to plaintiff any and all rights of action it might have had against defendants in exchange for plaintiff's agreement to retain counsel to pursue any such rights and to pay Hydrasun one-third of any recovery.

From almost the inception of this lawsuit, defendants attempted to procure the depositions of Stanley Frazer and William Cameron, two principals at Hydrasun. Because of the tremendous expenses and difficulties incident to obtaining discovery outside of the United States, defendant Crawford agreed to plaintiff's request to make Crawford's Scottish distributor available in this country at its own expense, in exchange for plaintiff's commitment to use its "best efforts" to make Messrs. Cameron and Frazer similarly available. The Crawford distributor from Scotland, Dave Cheetham, was deposed by plaintiff in the United States pursuant to this agreement early in the litigation.

Attempts by defendants to depose Frazer and Cameron, however, met with no success, despite repeated requests by defense counsel. In early June of 1980, plaintiff stated that it was bringing these witnesses in for the trial and that defendants could depose them at that time, a proposal clearly unacceptable to defendants. On June 6, 1980, a court order was entered directing that Stanley Frazer and William Cameron be made available for deposition in the United States, upon agreement by defendants to pay their expenses.

These depositions did in fact commence in early July of 1980. It became apparent at that time that Mr. Cameron had been in New Orleans conferring with plaintiff in early May of 1980. Mr. Cameron confirmed in his own deposition in July of 1980 (taken pursuant to court order) that he had been in New Orleans in May of that year, and that he had expected his deposition to be taken, and did not know why it had not gone forward at that time. Plaintiff had made neither defendants nor the court aware of this visit, merely insisting throughout the course of the discovery that it would do its best to make these witnesses available.

Frazer and Cameron insisted on leaving their depositions early for personal reasons. A conference before the magistrate was held, after which it was ordered that defendants be accorded a full and fair opportunity to depose these witnesses and examine documents in Scotland. A subpoena duces tecum was then served on the witnesses and another conference held to resolve objections thereto. These objections were disposed of, and the witnesses ordered to respond to proper requests at the designated time and place in Scotland.

On July 20, defendants sent three attorneys, Messrs. Mansour, Balhoff, and Cellini to take the ordered depositions. Accompanying counsel were the executive vice-president of defendant Crawford, the president of defendant Capital Valve and a court reporter. No one appeared on behalf of plaintiff. Hydrasun was represented by New Orleans counsel and by Scottish counsel.

At this time, Frazer and Cameron expressed a reluctance to divulge the financial documents requested. Defense counsel explained that these documents were necessary because of plaintiff's allegations of damage and because of plaintiff's recent motion to join additional defendants filed on June 19, 1980. These additional defendants included authorized Crawford distributors in Scotland and Norway who would, if joined, be required to furnish

financial data. Hydrasun declined to produce business information it regarded as confidential (fearing that it would be revealed to its competitors), unless plaintiff agreed to withdraw its motion to join defendants. By telephone that same date, plaintiff's counsel declined to do so. Accordingly, the deposition concluded, with no testimony taken and no documents produced. On September 19, 1980, plaintiff voluntarily withdrew its motion to join defendants.

Defendants went to great expense to obtain orders compelling discovery from Frazer and Cameron, to fly them to the United States for essentially aborted depositions, and to fly defense counsel to Scotland to resume the depositions pursuant to court order. All of this expense ultimately counted for nothing, as the witnesses finally refused to involve themselves in any way with the matter. This expense was attributtable to plaintiff's manifold evasions and vexatious changes of position.

The law is clear that attorneys' fees and travel expenses incurred in connection with the taking of a deposition usually are not taxable costs. *United States v. Bexar County*, 89 F.R.D. 391, 394 n.5 (W.D. Tex. 1981); *Hope Basket Co. v. Product Advancement Corp.*, 104 F.Supp. 444, 451 (W.D. Mich. 1952); 4 *Moore's Federal Practice* ¶ 26.82 (2d ed. 1983); 6 *Moore's Federal Practice* ¶ 54.77[2] (2d ed. 1983). However, under circumstances evidencing bad faith, vexatiousness or oppressiveness, an award of such costs may be made under the court's general equitable power. *See United States v. Bexar County*, 89 F.R.D. at 394 n.5 (travel, lodging and subsistence expenses incident to taking of depositions not taxable, in absence of prior court approval, *without a showing of extraordinary circumstances*); *Hope Basket Co. v. Product Advancement Corp.*, 104 F.Supp. at 451 ("no finding of unfairness or bad faith on the part of the plaintiffs or any finding of other equitable considerations which would justify an award of these attorney's fees and expenses as

taxable costs."); 4 *Moore's Federal Practice* ¶ 26.82 (2d ed 1983); 6 *Moore's Federal Practice* ¶ 54.77[2] (2d ed. 1983). Such equitable considerations clearly exist in this case. Plaintiff's conduct in this matter provides evidence of palapable vexatiousness. Under these circumstances, it would be unfair to force defendants to bear the costs of taking the court-ordered depositions in Scotland.

The court has reviewed the affidavits submitted in support of defendants' request for expenses incurred in connection with the Scotland deposition. The Court deems the amount requested for attorneys' fees and travel expenses actually paid by defendants to be reasonable under the circumstances. The Court notes that those who traveled to Scotland on defendants' behalf used a private airplane owned by Crawford to fly from Cleveland, Ohio to Aberdeen, Scotland and back. The affidavits submitted in support of the request for costs incurred in connection with the Scotland deposition trip do not state the amount expended for the use of this airplane. This being the case, the Court adopts the rate suggested by defendants, namely the rate of 24 cents per mile, the maximum statutory amount allowed government employees traveling on government business by private airplane. 5 U.S.C. § 5704. At this rate, a total of $1,758.48 (24 cents x 7,327 miles) is allowed for the transportation of all six persons traveling to Scotland on defendants' behalf. This amount is surely far less than the commercial airfare would have been and must be deemed reasonable under the circumstances.

In sum, $11,390.40 is allowed for attorneys' fees and general travel expenses incurred in connection with the Scotland depositions and $1,758.48 is allowed for the use of a private airplane to travel to Scotland and back.

III CONCLUSION

This court has pondered the argument that plaintiff acted as a private law enforcer and that it and others

like it should not be deterred in pursuing violators of the antitrust laws by the assessment of substantial costs against it. There are several answers to this. The first is that there must be some limits and some discipline applied even to law enforcement in this sense. The defendants were subjected to massive discovery and gigantic litigation costs by this action. The costs allowed by this decision are small by comparison. As this court had occasion to point out at an earlier stage of litigation, *J.T. Gibbons, Inc. v. Crawford Fitting Company*, 565 F.Supp. at 192:

> This case involved multimillion dollar claims of corporations against one another for alleged damages occasioned by their business activities. None of the individuals involved were poor. On the contrary, the evidence indicated they were all highly successful, intelligent businessmen.

It would be inequitable to relieve plaintiff of the obligation to pay the minimal costs assessed in this case.

The second answer is that the plaintiff in this case was clearly interested in advancing its own financial interest. Far from vindicating the public interest, there was considerable evidence in the record indicating that the Keeney's were using this litigation to obtain a Louisiana distributorship from Crawford Fitting Company.

The third answer is that the public interest is not served when a complex antitrust case containing all the abstruse verbiage known only to antitrust practitioners, and having no merit whatever, is thrust upon our overcrowded court dockets. This is a blatant disservice to the court system and to those litigants whose cases demand attention.[28]

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[28] Commenting on the role of trial judges in deterring the abuse of the court system, Chief Justice Burger said the following in his annual message on the administration of justice:

> Judges in some State courts and in Federal courts have exercised their discretionary authority to impose sanctions both on

The following is a summary of the costs allowed and disallowed in this case. The costs taxed for service of subpoenas ($89.55), witness fees ($1,610.00), depositions ($9,747.65) and daily trial transcripts ($21,607.00) stand as taxed by the clerk. The costs taxed under the category "exemplification and copies" are denied with the exception of $18,494.28 paid to Falls Advertising Company for the operation of the projector and screen at trial the preparation of slides used in connection therewith. Costs for expert witness fees paid to Dr. Thomas R. Saving ($37,255.70) are allowed, as are those paid to Dr. Phillip Robers ($49,225.00). Costs for expert witness fees paid to Mr. James C. Boland ($64,000.00) are disallowed. Costs for expenses incurred in connection with the deposition trip to Scotland are allowed in the amount of $13,148.88.

An outline of the costs allowed and disallowed is as follows:

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attorneys and their clients for filing frivolous cases and for abuse of discovery processes. In one state case, a trial judge held that the plaintiff's case was based on totally frivolous allegations and ordered the payment of nearly two million dollars in fees and expenses. Another judge imposed heavy costs against both the plaintiff and the attorney based on the State's new Civil Code of Procedures that authorized trial judges to impose sanctions on parties and attorneys who litigate in bad faith.

Annual Message on the Administration of Justice from Chief Justice Warren E. Burger, Midyear Meeting, American Bar Association (Feb. 12, 1984).

ALLOWED

Services of subpoenas	$ 89.55
Statutory witness fees	1,610.00
Daily trial transcripts	21,607.00
Costs incident to taking of depositions and copies of deposition transcripts	9,747.65
Operation of projector, screen and preparation of slides	18,494.28
Expert witness fees	8,480.70
Scotland Deposition	13,148.88
	$151,178.06

DISALLOWED

Audio-visual aids	$ 6,191.37
Expert witness fees	64,000.00
	$70,191.37

In conclusion, defendants are hereby awarded $151,178.06 in costs.

SO ORDERED.

EDMUND L. PALMIERI
U.S.D.J.

New York, New York
April 2, 1984

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-4616

INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO
and its LOCAL NO. 5-376,
Plaintiff-Appellee,
v.

CHAMPION INTERNATIONAL CORPORATION,
Defendant-Appellant.

Filed June 2, 1986

Before: Clark, Chief Judge, Wisdom, Gee, Rubin, Reavley, Randall, Johnson, Williams, Garwood, Jolly, Higginbotham, Davis, Hill and Jones, Circuit Judges.*

Opinion by Judge Carolyn Dineen Randall;
Concurrence and Dissent by Judge Alvin B. Rubin

Appeal from the United States District Court
for the Northern District of Mississippi
Norman L. Gillespie, Magistrate, Presiding

OPINION

CAROLYN DINEEN RANDALL, Circuit Judge:

Section 1920 of Title 28 allows the fees of witnesses to be taxed as costs in federal court, while section 1821

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* Due to his death on March 27, 1986, Judge Albert Tate, Jr. did not participate in this decision.

of the same title establishes the amount that may be so taxed. The case before us today asks whether—and if so, when—federal courts in non-diversity cases may tax as costs the fees of non-court-appointed expert witnesses in excess of the amount set forth in 28 U.S.C. § 1821. We hold that the fees of non-court-appointed expert witnesses are taxable only in the amount specified by § 1821, except that fees in excess of that amount may be taxed when expressly authorized by Congress, or when one of three narrow equitable exceptions to the American Rule applies. Our holding overrules those portions of *Jones v. Diamond*, 636 F.2d 1364 (5th Cir.) (en banc), *cert. dismissed*, 453 U.S. 950 (1981); *Copper Liquor Inc. v. Adolph Coors Co.*, 684 F.2d 1087 (5th Cir. 1982) (*Copper Liquor III*), *modified on other grounds en banc*, 701 F.2d 542 (5th Cir. 1983), and their progeny approving the taxing of excess expert witness' fees as costs under standards different from that here announced.

I.

International Woodworkers of America, AFL-CIO, CLC ("IWA") and one of its local unions sued Champion International Corporation ("Champion") alleging racial discrimination in employment in violation of Title VII and 42 U.S.C. § 1981. After a trial, the district court entered judgment on the merits dismissing the claims of all plaintiffs and assessing costs against IWA. We affirmed the district court's judgment on the merits.

After denying Champion's motion for attorneys' fees, the district judge referred all other questions to a magistrate. The magistrate awarded Champion $14,750.87 in costs, of which $11,807.16 were for a portion of the services of an expert witness employed by Champion for the statistical aspects of the case. IWA objected to certain parts of the award, particularly to the taxing of the expert witness' fees in an amount exceeding that provided for by § 1821, and the case returned to the district judge.

The district judge sustained IWA's objections to the taxing of the excess expert witness' fees, concluding that this court in *Jones v. Diamond* had adopted for the purpose of defendants' excess expert witness' fees the *Christianburg* standard set forth by the Supreme Court governing attorneys' fees.[1] Because IWA's suit did not meet this standard, the district court refused to grant Champion expert witness' fees in excess of the amount provided by § 1821.

On appeal, a panel of this court affirmed, rejecting Champion's argument that *Copper Liquor III* authorized excess expert witness' fees to a prevailing defendant if the "expert testimony was necessary or helpful to the presentation of civil rights claims, or indispensable to the determination of the case." The district court's finding that the IWA-Champion litigation failed to meet the *Christiansburg* standard remained unchallenged on appeal; the panel thus declined to reach the applicability of that standard. This court voted to rehear the case en banc, thereby vacating the panel opinion. *See* Fifth Circuit Local Rule 41.3.

II.

In the United States, contrary to the English practice, a rule of limited recovery of the expenses of litigation has developed to discourage costly litigation and guarantee access to the courts. *See, e.g., Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967). The "American Rule" draws a distinction between expenditures incurred by order of the court to facilitate consideration of the case, and expenditures incurred merely to aid one party in the presentation of his side. *See Ex Parte Peterson*, 253 U.S. 300, 316 (1920). The

[1] In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), the Supreme Court held that prevailing civil rights defendants are entitled to attorneys' fees only when the lawsuit is frivolous, unreasonable, or without foundation.

former, in times past referred to as costs "between party and party," and now known as taxable costs, are recoverable by the prevailing party under the American Rule; the latter, denominated costs "as between solicitor and client" and including such items as attorneys' fees and "other expenses entailed by the litigation not included in the ordinary taxable costs recognized by statute," *see Sprague v. Ticonic National Bank*, 307 U.S. 161, 164 (1939), such as expert witness' fees in excess of the amount provided for by statute, are generally borne by the litigants.

Before the merger of law and equity, courts at law awarded to the prevailing party costs "between party and party" as a matter of course. Courts sitting in equity had discretion to award such costs, or a portion thereof, as justice might demand. Federal courts sitting in equity also had limited discretion to award costs "as between solicitor and client" in certain exceptional cases. These exceptions to the American Rule were nearly identical to those recognized by the English High Court of Chancery: the "foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation." *Sprague*, 307 U.S. at 166. The exceptions were limited to cases involving preservation of a common fund, vexatious or oppressive prosecution of a claim or maintenance of a defense, *Hall v. Cole*, 412 U.S. 1, 5-6 (1972), or wilful disobedience of a court order. *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 426-28 (1923). Absent statute or equitable exception, however, under the American Rule litigants paid their own costs "as between solicitor and client."

In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975), the Supreme Court decided against fashioning a far-reaching exception to the American Rule for attorneys' fees, determining instead that it

would be "inappropriate for the judiciary, without legislative guidance, to reallocate the burdens of litigation. . . ." The Court reasoned that 28 U.S.C. § 1920(5) and § 1923 controlled the amount that might be awarded as attorneys' fees. The Court examined the congressional intent behind the statutory predecessor of § 1920 and § 1923: the Fee Bill of 1853. In enacting the 1853 Act, Congress undertook to standardize and limit the costs allowable in federal litigation. *Alyeska*, 421 U.S. at 251-252. The 1853 Act did not permit courts to "tax against the losing party 'solicitor and client' costs in excess of the amounts prescribed" therein. *Id.* at 258 n.30. True to the American Rule, the Court concluded that "absent statute or enforceable contract, litigants pay their own attorneys' fees." *Id.* at 257. Despite its decision not to carve a broad exception to the American Rule, the Court nevertheless recognized the three judicially fashioned equitable exceptions which, as the Court noted, have not been repudiated by Congress. *Id.* at 260. A federal court might award reasonable attorneys' fees to the prevailing party in excess of the small sums permitted by § 1923 when: (1) the trustee of a fund or property, or a party in interest, preserved or recovered the fund for the benefit of others in addition to himself; (2) a party acted in wilful disobedience of a court order; or (3) the losing party had acted in bad faith, vexatiously, wantonly, or for oppressive reasons.[2]

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[2] The last exception is consistent with our decison in *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 441 F.2d 631 (5th Cir.), *cert. denied*, 404 U.S. 941 (1971), in which we held that attorneys' fees and evcess expert witness' fees were taxable against a party acting in bad faith.

The Supreme Court has recently reaffirmed the limited nature of the exceptions to the American Rule, noting that most of the exceptions to the rule are statutory. *Marek v. Chesney*, 105 S. Ct. 3012, 3016 (1985). *See also Webb v. Board of Education of Dyer County*, 105 S. Ct. 1923, 1930 n.1 (1985) (Brennan, J., dissenting) (referring to the exceptions as "several narrow exceptions").

The American Rule of limited recovery, although most often discussed in the context of attorneys' fees, is equally applicable in the context of excess expert witness' fees. Like the statutory provisions before the *Alyeska* Court, those before us today find their origins in the Fee Bill of 1853. Section 1920 states that the court may tax as "costs" the fees of witnesses.[3] Section 1821 establishes the maximum amount that may be allowed for witnesses' attendance fees.[4] These sections represent Congress' treatment of the taxing of witness fees as costs. Courts cannot, in the absence of other explicit statutory author-

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[3] Section 1920 provides:

> A judge or clerk of any court of the United States may tax as costs the following:
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> (1) Fees of the clerk and marshal;
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> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case.
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

[4] Section 1821 provides in relevant part:

> (b) A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

This section draws no distinction between ordinary and expert witnesses, and it—or, more precisely, its statutory predecessor—has been held to apply to both categories of witnesses alike. *See Henkel v. Chicago, St. P., M. and O. Ruy.*, 284 U.S. 444 (1932).

ity or one of the three limited equitable exceptions recognized in *Alyeska*, tax as costs expert witness' fees in excess of the amount set forth in § 1821. Moreover, because the taxing of witness' fees as costs has been expressly provided for by federal statute, federal courts cannot tax excess fees as costs under Fed. R. Civ. P. 54(d), which provides for court discretion to tax costs "[e]*xcept* where express provisions therefor is made either in a statute of the United States or in these rules" (emphasis added).[5]

Our ruling is commanded by the Supreme Court's holding in *Henkel v. Chicago, St. P., M. and O. Rwy.*, 284 U.S. 444 (1932). Citing a statutory predecessor to § 1920 and § 1821, the Court found that because federal law made express provision for the amount payable and taxable as witness' fees, "additional amounts paid as compensation, or fees, to expert witnesses cannot be allowed or taxed as costs in cases in the federal courts." *Id.* at 446. The Court further observed that "Congress has dealt with the subject [of witness' fees] comprehensively and has made no exception of the fees of expert witnesses." *Id.* at 447. Although *Henkel* was a case decided "at law," the subsequent merger of law and equity effected by the adoption of the Federal Rules of Civil Procedure does not alter the result in *Henkel* in view of the

[5] Federal Rule of Civil Procedure 54(d) provides in pertinent part: "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . ." The Rule embodies the notion applicable to all civil actions after the merger of law and equity that, except as otherwise expressly provided by statute or rule, costs should be allowed as of course to the prevailing party. A federal court in its discretion could direct that certain costs, otherwise allowed as a matter of course, not be allowed.

That Rule 54(d) cannot be used to circumvent the limits on costs set forth in § 1920 and § 1821 was recognized by the drafters of the Rule. The Advisory Committee's Notes to Rule 54(d) emphasized that the terms of the statutory predecessor of § 1920 remained "unaffected by the rule."

specific language in Fed. R. Civ. P. 54(d) dealing with costs which are covered by express federal statutes.

The Court's reasoning in *Alyeska* in the analogous area of attorneys' fees further compels our conclusion that expert witness' fees are generally not recoverable beyond the amount specified by statute. As noted above, like the provisions before the *Alyeska* court, those before us today are statutory heirs of the Fee Bill of 1853. The congressional intent found relevant by the Supreme Court in *Alyeska* also governs here. The 1853 Act "specif[ied] in detail the nature and amount of the taxable items of costs in the federal courts." *Alyeska*, 421 U.S. at 252. The Act did not permit the taxing of excess "solicitor and client" costs. *Id.* at 258 n.30. Congress has not since "retracted, repealed or modified the limitations on taxable fees contained in the 1853 statute and its successors." *Id.* at 260. Just as Congress in the Fee Bill of 1853 extended no "roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." *Id.*, so too Congress extended no "roving authority" to allow expert witness' fees in excess of the amount specifically provided for by statute.[6]

Further, numerous statutes expressly allow federal courts to award the full amount of expert witness' fees as costs of litigation.[7] Given Congress' ability to provide

[6] Section 1920(6) allows the court to tax as costs the compensation of court-appointed experts. Our holding today recognizes that § 1920(6) acts in effect as a safety-valve, permitting the full compensation of court-appointed expert witnesses to be taxed as costs after notice and an opportunity to object to their appointment by the court.

[7] At least twenty-eight statutes provide for the taxing of expert witness' fees as costs in civil actions, albeit under varying standards: (1) Consumer Product Safety Act, 15 U.S.C. §§ 2060(c) (action for review of consumer product safety rule). 2072(a) (action by person injured by one in knowing violation of consumer

explicitly for the taxing of excess expert witness' fees as costs, we should not infer congressional intent to award

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product safety rule). 2073 (action for enforcement of consumer product safety rule); (2) Toxic Substances Control Act, 15 U.S.C. §§ 2618(d) (action for review of rule regulating toxic substances), 2619(c)(2) (citizen's action to compel compliance with regulations controlling toxic substances), 2620(b)(4)(C) (action to compel initiation of rulemaking proceeding regarding toxic substance); (3) Petroleum Marketing Practices Act, 15 U.S.C. § 2805(d)(3) (action to enforce provisions governing franchise relationship in petroleum marketing practice); (4) National Historic Preservation Act Amendments of 1980, 16 U.S.C. § 470w-4 (action for enforcement of provisions regarding national historic preservation; (5) Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(4) (citizen's action to compel compliance with provisions concerning endangered species); (6) Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2632(a)(1) (proceeding involving electric utility); (7) Tax Equity and Fiscal responsibility Act of 1982, 26 U.S.C. § 7430(a), (c)(1)(A)(ii) (action brought by or against United States in connection with determination, collection, or refund of any tax, interest, or penalty under Internal Revenue Code); (8) Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(A) (as amended by Pub. L. 99-80, 99 Stat. 184, 186) (any non-tort civil action brought by or against United States); (9) Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270(d) (civil action to compel compliance with provisions governing surface mining and reclamation); (10) Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1427(c) (civil action for equitable relief against person in violation of provisions regulating exploration and commercial recovery by U.S. citizens of deep seabed hard mineral resources); (11) Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1734(a)(4) (state action to recover royalty, interest, or civil penalty with respect to any oil and gas lease on federal lands located within the state); (12) Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 928(d) (action for recovery of compensation under LHWCA); (13) Federal Water Pollution Control Act, 33 U.S.C. § 1365(d) (citizen's action against person in violation of water pollution prevention and control provisions); (14) Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g)(4) (citizen's suit against person in violation of ocean dumping standards); (15) Deepwater Ports Act of 1974, 33 U.S.C. § 1515(d) (citizen's action against persons in violation of deepwater port provisions); (16) Act to Prevent Pollu-

such costs in the absence of an express statute so providing. Moreover, a statute which provides only for an

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tion from Ships, 33 U.S.C. § 1910(d) (actions authorized by provisions governing prevention of pollution from ships); (17) Safe Drinking Water Act, 42 U.S.C. § 300j-8(d) (action to compel compliance with provisions concerning the safety of public water systems); (18) Noise Control Act of 1972, 42 U.S.C. § 4911(d) (citizen's suit to compel compliance with noise control provisions); (19) Energy Reorganization Act of 1974, 42 U.S.C. § 5851(e)(2) (action for protection of employee of the NRC, an NRC licensee, an applicant for an NRC license, or a contractor or subcontractor of an NRC licensee or applicant); (20) Energy Policy and Conservation Act, 42 U.S.C. § 6305(d) (citizen's action to compel compliance with provisions concerning the energy conservation program for consumer products other than automobiles); (21) Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972(e) (citizen's action to compel compliance with provisions regarding solid waste disposal); (22) Clean Air Act, 42 U.S.C. §§ 7413(b) (action brought by EPA administrator against owner or operator of major stationary source of air pollution in violation of provisions concerning air pollution prevention), 7604(d) (citizen's suit to require compliance with provisions concerning air pollution prevention), 7607(f) (action for review of rules promulgated by EPA administrator concerning air pollution prevention); (3) Clean Air Act Amendments of 1977, 42 U.S.C. § 7622(b)(B), (e)(2) (action for protection of employee assisting in proceeding enforcing provisions on air pollution prevention); (24) Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. § 8435(d) (citizen's suit to compel compliance with provisions governing power plant and industrial fuel use); (25) Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. § 9124(d) (citizen's action to compel compliance with provisions regarding ocean thermal energy conversion); (26) Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1349(a)(5) (action to compel compliance with provisions governing Outer Continental Shelf leasing program); (27) Natural Gas Pipeline Safety Act, 49 U.S.C. § 1686(e) (citizen's action against persons in violation of provisions concerning natural gas pipeline safety); (28) Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. § 2014(e) (citizen's action against persons in violation of provisions concerning hazardous liquid pipeline safety).

Further, at least three other statutes expressly provide for the taxing of expert witness' fees as costs in administrative proceedings: (1) Federal Trade Commission Improvement Act, 15 U.S.C.

award of "costs" or "attorneys' fees" but which fails to address expert witness' fees will not be construed to authorize the taxing of expert witness' fees in excess of the § 1821 amount.

The Supreme Court's holding in *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964), does not command a rule different from that today announced. *Farmer* presented the Supreme Court with the question whether, in view of Rule 45(e)'s command that witnesses cannot be compelled to travel more than 100 miles, a party who procured their voluntary attendance by paying the witnesses' transportation expenses could have those expenses taxed as costs against a defeated adversary. The Supreme Court held that the trial court did not abuse its discretion under Rule 54(d) in refusing to tax certain items as cost. In dicta, the court explained: "the discretion given district judges to tax costs should be sparingly exercised with reference to expenses *not specifically allowed by statute.*" *Farmer*, 379 U.S. at 235 (emphasis added). Whatever import this quoted language carries for the assessment of expenses *not specifically allowed by statute*, it is not relevant here, for expert witness' fees have been comprehensively dealt with by Congress in § 1920 and § 1821. In addition, the Court in *Farmer* upheld the exercise of the district court's discretion under Rule 54(d) to *refrain* from taxing certain expenses as costs; to rely on *Farmer* to justify the affirmative taxing of witness' costs in excess of the § 1821 amount would turn *Farmer* on its head.

We overrule those portions of our prior opinions suggesting standards for the taxing of excess expert witness'

§ 57a(h)(1) (participation in rulemaking proceedings of Federal Trade Commission regarding unfair or deceptive acts or practices); (2) Toxic Substances Control Act, 15 U.S.C. § 2605(c)(4)(A) (participation in rulemaking proceeding regarding hazardous chemical substances and mixtures); (3) Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §825q-1(b)(2) (proceedings before Office of Public Participation).

fees different from that now adopted. In *Jones v. Diamond*, we acknowledged that expert witness' fees were generally recoverable only in the amount prescribed by § 1821, but determined nevertheless that "Congress had manifested an intention that a different rule be applied for civil rights plaintiffs." 636 F.2d at 1382. District courts had "in many instances" awarded "the full fees of experts on the ground that their testimony and assistance were necessary or helpful in representing clients in civil rights litigation." *Id.* As noted by the *Jones* dissent, however, the majority cited no act of Congress to support its decision, but relied only on a single sentence from "a Senate Report concerning legislation which could have contained . . . a provision [authorizing the award of excess expert witness' fees as costs] but *did not.*" *Id.* at 1391 (Coleman, C.J., dissenting) (emphasis in original). The single cited sentence in the Senate Report does not authorize the taxing of excess expert witness' fees as costs, and the *Jones* holding on excess expert witness' fees cannot stand in light of the rule announced today.

In *Copper Liquor III*, an antitrust case, we indicated in a part of the opinion entitled "Section 1920 Costs" that trial courts had discretion to award excess expert witness' fees in "exceptional circumstances, for example, when the expert testimony was necessary or helpful to the presentation of civil rights claims, or indispensable to the determination of the case." 684 F.2d at 1100 (footnotes omitted). This conclusion that § 1920 authorizes the award of excess expert witness' costs in "exceptional circumstances" is overruled.[8]

[8] We also overrule that portion of *Berry v. McLemore*, 670 F.2d 30, 34 (5th Cir. 1982), in which we relied on *Jones* to find an abuse of discretion in the district court's failure to assess as an item of costs the full fee of an expert witness who was "important" to the plaintiff's § 1983 case. Our holding on excess expert witness' fees in *Greenhaw v. Lubbock County Beverage Ass'n*, 721 F.2d 1029, 1033 (5th Cir. 1983), also cannot stand in light of the rule adopted above.

III.

Given the principles set out in Part II of this opinion, we now affirm, albeit on different grounds, the district court's denial of expert witness' fees in excess of the amount provided for in 28 U.S.C. § 1821. The statutes applicable here, 42 U.S.C. § 1988 and § 2000e-5(k), provide for the award of attorneys' fees to prevailing parties, but make no mention of excess expert witness' fees. None of the equitable exceptions to the American Rule is here claimed. Champion thus must content itself with the amount recoverable for expert witnesses under § 1821.

IV.

We hold that the fees of non-court-appointed expert witnesses are taxable by federal courts in non-diversity cases only in the amount specified by § 1821, except that fees in excess of that amount may be taxed when expressly authorized by Congress, or when one of the three narrow equitable exceptions recognized by *Alyeska* applies. We direct the district courts in the exercise of our supervisory power to apply the rule announced today to all pending cases.

For the above reasons, the judgment of the district court is AFFIRMED.

No. 83-4616 *International Woodworkers v. Champion*

No. 84-3332 *Gibbons v. Crawford Fitting Company*

ALVIN B. RUBIN, J., concurring in the result in *International Woodworkers of America v. Champion International Corp.*, and dissenting in *J.T. Gibbons, Inc. v. Crawford Fitting Co., et al.**

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* Judges Wisdom, Johnson, and Williams join in Judge Rubin's opinion concurring in the result in *International Woodworkers of America v. Champion International Corp.*, and Judges Goldberg, Johnson, and Williams join in his dissent in No. 84-3332—*J. T. Gibbons, Inc. v. Crawford Fitting Company, et al.*

The majority opinion today fashions a rule that has not been adopted by any other circuit. It applies that rule to the recovery of expert witness fees without considering the recoverability of other litigation expenses. And it applies that rule without distinction to two dissimilar cases in which the recovery of expert witness fees is sought on completely different bases. In *Woodworkers*, a defendant who was the prevailing party in an employment discrimination suit requests expert witness fees as a litigation expense incidental to an award of attorney's fees authorized by The Civil Rights Attorney's Fees Awards Act of 1976. 42 U.S.C. § 1988. In *Gibbons*, the defendant who prevailed in an antitrust suit invokes the court's discretion under Federal Rule of Civil Procedure 54(d) to recover costs, including the fees of expert witnesses for courtroom testimony.

Each of these cases involves a different question. When a statute authorizes an award of attorney's fees to the prevailing party in addition to costs, as in *Woodworkers*, that party should not be denied the right to recover all those expenses for which an attorney would normally bill his client. There is no reason to distinguish, in this respect, between expert witness fees and the myriad other costs incident to litigation that are incurred by a lawyer and billed to his client. While the majority deals expressly only with expert witness fees, the effect of its rationale must inevitably extend to a denial of all other costs of litigation, save reimbursement for the personal services of the lawyer and for those limited costs specified in 28 U.S.C. § 1920.

If, like the victor in *Gibbons*, the prevailing party does not have a statutory right to recover attorney's fees, he may not recover either his lawyer's fees or his lawyer's expenses, but he may request that the district court exercise its discretion under Rule 54(d) to award the costs of litigation, including the fees paid to experts for testifying in court.

Neither the court's general discretion to tax costs, nor its determination of which expenses to include in a statutorily authorized award of attorney's fees is, or should be, governed by the standards that define the court's equitable powers to award attorney's fees, as summarized in *Alyeska Pipeline Service Co. v. Wilderness Society.*[1] The application of a single rule to both kinds of cases obliterates the important differences between them and risks overriding Congress' intent in authorizing civil rights attorney's fees.

The majority's rule produces illogical results: Absent a fee-shifting statute, expert witness fees may be recovered when (and only when) attorney's fees would be permitted under the *Alyeska* rule. If, however, Congress has enacted a statute explicitly authorizing the award of attorney's fees in an effort to shift the burden of litigation expenses from the prevailing party to the wrongdoer, expert witness fees are not recoverable even though attorney's fees are.

I.

Both cases before us are affected, although not resolved, by the statutes that govern the taxation of costs in federal courts. 28 U.S.C. § 1920, set forth in full in the footnote,[2]

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[1] 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975).

[2] 28 U.S.C. § 1920 provides:

> A judge or clerk of any court of the United States may tax as costs the following:
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> (1) Fees of the clerk and marshal;
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> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
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> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;

lists certain costs that courts are permitted to tax. Its language is neither mandatory nor exclusive. It permits the taxing of fees for court-appointed expert witnesses, and the taxing of limited costs for ordinary witnesses, set by 28 U.S.C. § 1821 at thirty dollars per day plus a travel allowance. Section 1920 does not mention fees for expert witnesses except for those appointed by the court. The significance of this omission for the two cases before us depends on a careful review of the questions they present.

The prevailing defendant in *Woodworkers* seeks to recover both attorney's fees and expert witness fees under The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.[3] That statute authorizes the court, "in its discretion," to "allow the prevailing party . . . a reasonable attorney's fee as part of the costs." *Woodworkers*, therefore, poses a question of statutory interpretation: Did Congress, in enacting § 1988, intend to allow a prevailing party compensation only for fees actually paid to the lawyer himself for legal services rendered, in addition to the routinely recoverable costs listed in § 1920, or did it also intend to allow recovery of the attorney's expenses and other necessary and reasonable costs of litigation?

Gibbons, however, poses a different question. That suit was brought under the Clayton Act, which permits the award of costs and attorney's fees only to a prevailing plaintiff.[4] A victorious defendant may recover costs only by invoking the court's general discretion under Federal Rule of Civil Procedure 54(d). The question presented, therefore, is whether the court's discretion permits the

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> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.
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> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

[3] 42 U.S.C. § 1988 (1982).

[4] 15 U.S.C. § 15 (1982).

award of expert witness fees, and if so, whether the court abused its discretion in this case.

II.

Section 1988 should be interpreted, I submit, to include within the phrase "attorney's fees as part of the costs" not only fees for a lawyer's services and those costs specified in § 1920, but all of the reasonable expenses of litigation that a privately retained lawyer would usually bill to his client.[5] The Act's legislative history makes clear that an attorney who recovers his fee under § 1988 should receive neither more nor less than an attorney who is paid by his client. This means that office overhead and secretarial expense, normally paid by the attorney out of his fee, whether fixed at a stated amount, or calculated hourly or on some other basis, should not be awarded separately. However, the court should award other reasonable and necessary costs that an attorney incurs and normally bills separately to the client, such as travel costs, long-distance telephone bills, fees paid to consultants, the costs of preparing exhibits, and any other of the multitudinous expenses of litigation.

Expert witness fees are not so singular as to be treated differently from all other litigation expenses. A court's authority to award these expenses comes neither from the equitable powers described in *Alyeska Pipeline Service Co. v. Wilderness Society*,[6] nor from the courts' limited authority under § 1920, nor from its general discretion pursuant to Rule 54(d), but from The Civil Rights Attorney's Fees Awards Act itself, and from Congress' unequivocal statement of the Act's purpose.

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[5] One commentator has suggested that § 1920 should limit the amounts of costs awarded incident to attorney's fees for the basic categories of costs that the statute covers. *See* Bartell, Taxation of Costs and Awards of Expenses in Federal Court, 101 FRD 553, 595-96 (1984).

[6] 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975).

Although the statute explicitly refers only to the award of attorney's fees, Congress made clear that attorneys were to be paid "as is traditional with attorneys compensated by a fee-paying client."[7] As the Act's sponsor, Representative Drinan, stated during the House debate, "I should add that *the phrase 'attorney's fee' would include . . . all incidental and necessary expenses incurred in furnishing effective and competent representation.*"[8] These remarks are consistent with the frequent observation that private enforcement of the civil rights laws depend on the citizens' "opportunity to recover what it costs them to vindicate these rights in court."[9] To fulfill its purpose, the Act necessarily authorized reimbursement for all the resources necessary for "*effective access* to the judicial process."[10] "Congress must insure [that civil rights litigants] have the means to go to court and *to be effective once they get there*,"[11] because "[i]f the cost of private enforcement actions becomes too great, there will be no private enforcement."[12] And, if prevailing plaintiffs or their attorneys must bear the burden of prohibitive expert witness fees, the civil rights laws will be enforced either less frequently or less effectively than Congress intended.

Although *Woodworkers* involves a prevailing civil rights defendant unaffected by these policy considerations, the statute does not distinguish between prevailing parties

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[7] S. Rep. No. 1011, 94th Cong. 2d Sess. 6 (1976).

[8] 122 Cong. Rec., 35,123 (1976) (emphasis added).

[9] S. Rep. No. 1011, 94th Cong. 2d Sess. 2 (1976); *see also, e.g.*, 122 Cong. Rec. 31,471, 33,313 (1976).

[10] H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976) (emphasis added).

[11] 122 Cong. Rec. 33,313 (1976) (emphasis added).

[12] S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976). *See also Evans v. Jeff O.*, —— U.S. ——, —— 54 U.S.L.W. 4359, 4367-68 (1986) (Brennan, J., dissenting).

as to the expenses that are reasonable, and *Christiansburg Garment Co. v. E.E.O.C.*[13] requires that, when the complaint brought proves to be frivolous or unfounded, the defendant must be awarded whatever expenses the plaintiff might have recouped. The rule propounded by the majority today in the case of a prevailing civil rights defendant applies equally to victorious civil rights plaintiffs. Although today's application of the rule affronts no congressional policy, its primary effect in the future will be seen in the financial handicap it imposes on the civil rights plaintiffs that Congress sought to assist.

As the Eleventh Circuit has written in *Dowdell v. City of Apopka, Fla.*:

> Reasonable attorneys' fees under the Act must include reasonable expenses because attorneys' fees and expenses are inseparably intertwined as equally vital components of the costs of litigation. The factually complex and protracted nature of civil rights litigation frequently makes it necessary to make sizeable out-of-pocket expenditures which may be as essential to success as the intellectual skills of the attorneys. If these costs are not taxable, and the client, as is often the case, cannot afford to pay for them, they must be borne by counsel, reducing the fees award correspondingly.
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> * * * *
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> . . . [I]f the real income of civil rights litigators is decreased because they must absorb costs which are generally billable in other types of cases, the market result will be to channel attorneys toward more remunerative types of litigation. Decreasing the supply of attorneys necessarily decreases the access to the courts of victims of civil rights violations.[14]

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[13] 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978).

[14] 698 F.2d 1181, 1190-91 (11th Cir. 1983).

III.

The linchpin of the majority opinion is its conclusion that expert witness fees are sufficiently analogous to attorney's fees that both should be controlled by the guidelines set out in *Alyeska*. Despite this perceived analogy, the majority denies that Congress might have intended expert witness fees and other out-of-pocket expenses to be included as incidental expenses within an award of attorney's fees or costs. In so holding, the majority takes a path inconsistent with that chose by every other circuit. It supports this novel result by reasoning that, because Congress has expressly provided for the award of expert witness fees in some statutes, it must therefore have intended to exclude them in all other instances, and by finding that the word "costs" refers only to those limited costs specified in § 1920.

The fact that Congress has expressly mentioned expert witness fees in addition to attorney's fees and costs in more recently adopted expense-shifting statutes does not persuade me that the fee-shifting phrases in the Civil Rights Act, the Clayton Act, and all other earlier enacted statutes were intended to exclude them. Over two-thirds of the statutes cited by the majority were enacted within the last ten years, and all were enacted within the last fifteen. Consequently, I do not find them determinative of the intent that Congress had when it enacted such statutes as the Clayton Act a hundred years ago, long before expert witness fees became so substantial and common-place as to warrant express reference. Neither should such interpretation by negative implication override the explicit legislative history of a more recently enacted statute, such as the Civil Rights Attorneys' Fees Awards Act.

Circuit courts from every circuit, in cases arising under § 1988, have allowed the prevailing party to recover expert witness fees or other expenses of litigation not enu-

merated in § 1920, either as costs or as part of attorney's fees: [15]

The First Circuit, in *Palmigiano v. Garrahy*,[16] approved the inclusion of all reasonable and necessary expenses in awards of attorney's fees under § 1988.

The Second Circuit, in *Beazer v. New York City Transit Authority*,[17] awarded the expenses of a pre-trial hearing and trial preparation under § 1988.

The Third Circuit, in *Wehr v. Burroughs*,[18] has awarded LEXIS charges as a reasonable expense of litigation included within an award of attorney's fees.

The Fourth Circuit, in *Wheeler v. Durham City Board of Education*,[19] approved the award of copying, long distance telephone and travel expenses, along with all other out-of-pocket expenditures by a successful civil rights attorney.

In *Berry v. McLemore* [20] and *Jones v. Diamond*,[21] cases the majority today overrules, this circuit has awarded expert witness fees under § 1988.

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[15] *See generally*, Bartell, *supra* note 5 (collecting cases in addition to those cited here).

[16] 707 F.2d 636, 637 (1st Cir. 1983). *Cf. Wildman v. Lerner Stores Corp.*, 771 F.2d 605, 612, 614 (1st Cir. 1985).

[17] 558 F.2d 97, 100 (2d Cir. 1977), *rev'd on other grounds*, 440 U.S. 568, 99 S.Ct. 1355, —— L.Ed.2d —— (1979).

[18] 619 F.2d 276, 284 (3d Cir. 1980); *see also Walker v. Robbins Hose Co.*, 622 F.2d 692, 694-95 (3d Cir. 1980); *Id.* at 695-97 (Sloviter, J., dissenting).

[19] 585 F.2d 618, 623-24 (4th Cir. 1978).

[20] 670 F.2d 30, 34 (5th Cir. 1982). *See also Richardson v. Byrd*, 709 F.2d 1016, 1023 (5th Cir.), *cert. denied*, —— U.S. ——, 104 S.Ct. 257, —— L.Ed.2d —— (1983) (awarding paralegal fees).

[21] 636 F.2d 1364, 1382 (5th Cir.), *cert. denied*, 453 U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1981).

The Sixth Circuit, in *Northcross v. Board of Education of Memphis City Schools*,[22] held that, although costs such as expert witness fees that were paid to third parties could not be considered part of attorney's fees, all other out-of-pocket expenses normally billed to a fee paying client should be included in § 1988 fee awards. The court approved the award of expert witness fees under the district court's Rule 54(d) discretion, independent of the attorney's fee statute.

The Seventh Circuit has frequently addressed the issue, permitting the award of all reasonable and necessary costs of litigation in *Redding v. Fairman*,[23] and specifically approving the award of expert witness fees under § 1988 in *Heiar v. Crawford County* [24] and in *Strama v. Peterson*.[25] Other Seventh Circuit cases have permitted the award of telephone, postage, copying, deposition, and travel expenses,[26] paralegals' hourly fees,[27] or simply "all reasonable out-of-pocket litigation expenses." [28]

The Eighth Circuit, in *Easley v. Anheuser-Busch, Inc.*,[29] has awarded expert witness fees for in-court testimony and, in *American Family Life Assurance Co. v. Teasdale*,[30] for pre-trial consultations. It has also approved

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[22] 611 F.2d 624, 639-40 (6th Cir. 1979), *cert. denied*, 447 U.S. 911, 100 S.Ct. 2999, 64 L.Ed.2d 862 (1980).

[23] 717 F.2d 1105, 1119 (7th Cir. 1983), *cert. denied*, 465 U.S. 1025, 104 S.Ct. 1282, —— L.Ed.2d —— (1984).

[24] 746 F.2d 1190, 1203-04 (7th Cir. 1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 3500, —— L.Ed.2d —— (1985).

[25] 689 F.2d 661 (7th Cir. 1982).

[26] *Heiar, supra*; *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1282 (7th Cir. 1983); *Strama, supra*.

[27] *Heiar, supra*; *Strama, supra*.

[28] *Henry v. Webermeier*, 738 F.2d 188, 192 (7th Cir. 1984).

[29] 758 F.2d 251, 257 (8th Cir. 1985).

[30] 733 F.2d 559, 571 (8th Cir. 1984).

the award of all reasonable out-of-pocket expenses under § 1988.[31]

The Ninth Circuit, in *Thornberry v. Delta Airlines, Inc.*,[32] awarded paralegal expenses, the costs of travel, and all out-of-pocket expenses under § 1988. It adopted the position of the Sixth Circuit in *Northcross*, allowing expert witness fees and other third-party payments to be awarded under Rule 54(d) rather than under § 1988.

The Tenth Circuit, in *Ramos v. Lamm*,[33] awarded similar costs, including expert witness fees, and approved the award of all costs that would normally be billed separately to clients by a typical law firm in the area.

As I have already noted, in *Dowdell v. City of Apopka, Fla.*,[34] the Eleventh Circuit awarded all reasonable expenses not normally absorbed by the attorney as overhead,[35] even though it does not allow similar expenses to be awarded under Rule 54(d) discretion.[36] The Court wrote "[w]e reject any interpretation of "reasonable costs" which would penalize attorneys for undertaking civil rights litigation. 'No one expects a policemen, or an office holder, to pay for the privilege of enforcing the law.' "[37] And the District of Columbia Circuit has held,

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[31] *Id.*

[32] 676 F.2d 1240, 1244-45 (9th Cir. 1982), *vacated on other grounds*, 461 U.S. 952, 103 S.Ct. 2421, 77 L.Ed.2d 1311 (1983).

[33] 713 F.2d 546, 558-60 (10th Cir. 1983).

[34] 698 F.2d 1181, 1188-92 (11th Cir. 1983) (quoting remarks of Sen. Tunney, 122 Cong. Rec. 33,313 (1976)).

[35] *See also Allen v. U.S. Steel Corp.*, 665 F.2d 689, 696-97 (11th Cir. 1982) (deposition and paralegal expenses).

[36] *See, e.g., Loughan v. Firestone Tire & Rubber Co.*, 749 F.23 1519 (11th Cir. 1985); *Kivi v. Nationwide Mutual Insurance Co.*, 695 F.2d 1285, 1289 (11th Cir. 1983).

[37] 698 F.2d at 1191.

in *Laffey v. Northwest Airlines, Inc.*,[38] that § 1988 authorizes the award of all reasonable costs normally passed on to clients. The court wrote

> [W]e need not attempt to trace an unwavering line between those out-of-pocket expenses which are compensable and those which are not. The line of division—as with the hourly rate—should fall where the market has placed it. Some law firms routinely pass such costs on; others charge slightly higher fees and absorb those costs. It would grant a windfall to attorneys to reimburse them for expenses which normally are absorbed as part of their overhead; it would penalize them to deny compensation for expenses which they expect to pass directly to clients. The appellees are entitled to these costs upon showing that such costs are of a type passed on by the firms involved to private clients.[39]

Until today, no circuit has limited the award of litigation expenses incidental to attorney's fees under § 1988 to the costs enumerated in § 1920.[40] None has found reason to treat expert witness fees as sui generis, and none has applied *Alyeska* in this context.

IV.

The majority takes *Alyeska* as its guide, although that case does not reach, and certainly does not determine, the question of what adjuvant expenses may be included within a statutorily authorized award of attorney's fees. The *Alyeska* Court refused "to fashion a far-reaching exception to [the] 'American Rule' "[41] that would permit

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[38] 746 F.2d 4, 30 (D.C. Cir. 1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 3488, —— L.Ed.2d —— (1985).

[39] *Id.*

[40] *See also* Bartell, *supra* note 5 at 589-96.

[41] 421 U.S. at 247, 95 S.Ct. at 1616.

district courts to award attorney's fees *without statutory authorization* whenever a plaintiff, acting as a "private attorney general," vindicated a statutorily endorsed public policy. The Court held only that Congress, not federal courts, must dictate which statutes, when enforced by private citizens, warrant the recovery of attorney's fees.

The *Alyeska* opinion refers to § 1920 in recounting the history of the American courts' authority to award attorney's fees. It traces the present version of § 1920 back to an 1853 statute that permitted certain enumerated costs, "and no other compensation [to] be taxed and allowed to attorneys." [42] The Court suggests in footnote dicta that, although there is no similar language in the present version of § 1920, "nothing . . . indicates a congressional intention to depart from" the exclusion of other costs and fees mandated by the 1853 rule.[43]

Immediately thereafter, the Court adds that neither the 1853 statute nor any of its successors have been construed to interfere "with the historic power of equity" to award *attorney's fees* in limited circumstances, such as for the recovery of a common fund, willful disobedience of a court order, or bad faith litigation.[44] The Court does not imply that these examples bound a court's equitable powers to tax the costs of litigation. It concludes only that these three exceptions "are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress, [and that] none of the exceptions is involved here." [45]

Attorney's fees are not synonymous with costs, and the Supreme Court has long ago held that the 1853 attorney's

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[42] *Id.* at 253, 95 S.Ct. at 1620.

[43] *Id.* at 255 nn. 28 & 29, 95 S.Ct. at 1621 nn. 28 & 29.

[44] *Id.* at 257-58, 95 S.Ct. at 1621-22. (emphasis added).

[45] *Id.* at 259, 95 S.Ct. at 1622.

fee statute does not deal "expressly or by implication with the subject of taxing as costs the expense of [experts or stenographers]." [46] The *Alyeska* dictum does not require us to limit the costs that a district court may tax to those enumerated in § 1920, and *Alyeska* clearly has no bearing on fee awards authorized by statute.

Recourse to *Alyeska* is particularly inappropriate in § 1988 cases. As the legislative history of that section repeats time and again, § 1988 was enacted expressly to counteract the effect of the *Alyeska* decision.[47] The House Report notes that "civil rights litigants were suffering very severe hardships because of the *Alyeska* decision," [48] that its effect was "devastating," and that it might "as a practical matter, repeal the civil rights laws for most Americans." [49] Similarly, the Senate Report begins by stating that the Act was intended to remedy the gaps created in our civil rights laws by *Alyeska*.[50] To impose the limitations and policies of *Alyeska* on fee awards under § 1988 is to disregard entirely the primary congressional purpose behind its enactment. The traditional limitations of the American Rule, of *Alyeska*, of § 1920, and of Fed. R. Civ. P. 54(d) do not apply to awards made pursuant to § 1988, because that statute is based upon policies antithetical to those restrictions.[51]

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[46] *In re Peterson*, 253 U.S. 300, 317, 40 S.Ct. 543, 549, —— L.Ed. —— (1920); *see also Newton v. Consolidated Gas Co.*, 265 U.S. 78, 83, 44 S.Ct. 481, 482-83, —— L.Ed. —— (1924).

[47] *See, e.g.*, S. Rep. No. 1011, 94th Cong., 2d Sess. 1, 4-6 (1976); H.R. Rep. No. 1558, 94th Cong., 2d Sess. 2-3 (1976); 122 Cong. Rec. 31,472, 31,474, 33,314, 35,122-28 (1976). *See also Evans v. Jeff O.*, —— U.S. ——, ——, 54 U.S.L.W. 4359, 4367-68 (1986) (Brennan, J., dissenting).

[48] H.R. Rep. No. 1558, 94th Cong., 2d Sess. 2 (1976).

[49] 122 Cong. Rec. 35,128 (1976).

[50] S. Rep. No. 1011, 94th Cong., 2nd Sess. 1 (1976).

[51] *Dowdell*, 698 F.2d at 1189 n.12 (11th Cir. 1983).

V.

In *Christiansburg Garment Co. v. E.E.O.C.*,[52] the Supreme Court held that a prevailing civil rights defendant should be awarded attorney's fees under § 1988 only when the plaintiff's suit was frivolous, unreasonable, or unfounded.

The majority decides that, because a fee-shifting statute applies in *Woodworkers*, and because the statute does not expressly permit expert witness fees, the court has no authority to award them, presumably not even under the *Alyeska* criteria which are to be applied in the absence of a fee-shifting statute. The majority ignores the similarity between the *Alyeska* standard of vexatious or oppressive actions and the *Christiansburg* standard of unfounded or vexatious litigation: expert witness fees that might have been taxed to the plaintiff for bringing an unfounded tort suit may no longer be taxed for bringing an equally unfounded civil rights or employment discrimination action. Even if Congress did not intend that expert witness fees be awarded as a component of attorney's fees, as I believe it did, it surely did not intend by its reference to attorney's fees to lessen the courts' general authority to award other costs as deterrent to frivolous litigation. Yet that is the result of the majority's rule.

I believe that the *Woodworkers* district court reached the right result for the right reasons. It found that the suit had a reasonable basis and applied *Christiansburg* to deny the defendant attorney's fees. It properly applied the same standard and invoked the same discretion to deny expert witness fees that might have constituted a reasonable expense incidental to the award of attorney's fees. And although, for reasons, I will discuss in the next section, the court also had discretion under Rule

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[52] 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978).

54(d) to tax expert witness fees as costs, the prevailing defendant did not seek an award on this basis. The court's denial of the award should, therefore, be affirmed.

VI.

Had the plaintiff prevailed in *Gibbons*, it would have been entitled both to treble damages and "the cost of suit, including a reasonable attorney's fee." [53] The rule adopted by the majority would not permit such a successful plaintiff to recover expert witness fees and, I submit, by inexorable logical extension, any other out-of-pocket expenses not enumerated in § 1920 for which the plaintiff's counsel would normally have billed his client. Although some circuit courts have reached the same result in Clayton Act litigation, this seems to me to be incorrect. Allowing a prevailing party treble damages, attorney's fees, and even, at times, prejudgment interest, but denying recovery of all of the other expenses incident to litigation is anomalous. There would be no reason to specify by statute that the cost of suit might be awarded if those costs referred only to the expenses ordinarily taxed to the loser. As Professor Moore points out, "had Congress intended 'cost of suit' [in the Clayton Act] to include only taxable costs, it would have said so." [54]

In *Gibbons*, however, the defendant prevailed and no statutory fee-shifting provision entitled it to attorney's fees. In the absence of any other provision, Fed. R. Civ. P. 54(d) controls. It is succinct:

> Except when express provision therefore is made either in a statute of the United States or in these rules costs shall be allowed as of course to the prevailing party unless the court otherwise directs; . . .

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[53] 15 U.S.C. § 15 (1982).

[54] 6 J Moore, W. Taggart & J. Wicker, Moore's Federal Practice § 54.71[3] (2d ed. 1982).

That rule does not define the term "costs." The majority construes it to restrict the definition of "costs" to those costs specified in § 1920. It does so by finding that § 1920 is an express statutory provision that governs, and provides the exclusive authority for, the award of expert witness fees, obviating the discretion allowed by Rule 54(d), and prohibiting the taxing of any costs not listed therein.

Section 1920 does not on its face purport to be exclusive. It does not say, "only the following costs" shall be allowed. Neither does it provide expressly for the taxing of expert witness fees. Its phrasing is permissive because it was revised, after enactment of the Federal Rules, in recognition of the discretion that Rule 54(d) affords.[55] It is not, therefore, the kind of "express provision" that is an exception according to the terms of Rule 54(d). If it were, then § 1920 would control every case, and Rule 54(d) would be completely redundant, without any independent force or meaning.

Even if the majority were correct in holding that § 1920 is exclusive, the majority does not follow this interpretation to its logical conclusion, for the majority holds that, in the exceptional circumstances borrowed from *Alyeska*, *§ 1920 does not apply* and some other unspecified authority affords the court broader discretionary powers. If, on the other hand, the majority means that § 1920 is not *always* exclusive, then it fails to explain how § 1920 can abrogate the discretion Rule 54(d) appears to give, and why expert witness fees should be treated differently from all other costs.

Those circuits that have refused to permit the taxation of expert witness fees under Rule 54(d) have, like the majority, relied on a 1932 Supreme Court decision, *Henkel v. Chicago, St. Paul, Minneapolis & Omaha Railway*,[56]

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[55] 1948 United States Code Congressional Service 1887-88 (80th Cong., 2d Sess.).

[56] 284 U.S. 444, 52 S.Ct. 223, —— L.Ed. —— (1932).

in which the Court wrote that expert witness fees were included within, and limited to, the per diem and travel allowances for ordinary witnesses in 28 U.S.C. §§ 600(a) & (c) (precursors of 28 U.S.C. §§ 1920 & 1821). The Court held that federal courts had no authority, either in their discretion or under state law, to award as costs compensation to witnesses in excess of the statutory amount.[57]

Although the issue in *Henkel* was the same as that now presented, the district court powers that it described have since changed. *Henkel* was decided before the adoption of the Federal Rules of Civil Procedure and before the merger of actions at law and equity. It was written in answer to a certified question inquiring whether district courts had the authority to tax expert witness fees as costs in a case at law. At that time, courts sitting in law had no power to award costs not expressly granted by statute.[58] At equity, as *Alyeska* affirms, courts have always retained the power to award fees not specified by statute.[59] With the merger of law and equity, Rule 54(d) gave federal courts in all actions the broader discretion previously afforded only to courts of equity. As Judge Frank wrote:

> [Rule 54(d)] appears to have adopted, for all suits covered by it, the previous federal practice in equity, according to which the trial court had wide discretion in fixing costs, a discretion not reviewable unless manifestly abused. . . .[60]

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[57] *Id.* at 446, 52 S.Ct. at ——.

[58] *See* 10 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 2665, at 170 (2d ed. 1983); Payne, Costs in Common Law Actions in the Federal Courts, 21 Va. L. Rev. 397, 399-400 (1935).

[59] *See Supra* note 53. *See also In re Peterson*, 253 U.S. 300, 316, 40 S.Ct. 543, 548 (1920).

[60] *Harris v. Twentieth Century Fox Film Corp.*, 139 F.2d 571, 572 n.1 (2d Cir. 1943); *see also Cox v. Maddox*, 285 F. Supp. 876, 879 (E.D. Ark. 1968); *Farrar v. Farrar*, 106 F. Supp. 238, 241 (W.D.

This conclusion is confirmed by Wright & Miller who state that Rule 54(d) today "makes the allowance of costs discretionary and, thus, adopts the practice formally followed in equity rather than at law." [61]

Since the adoption of Rule 54(d), the Supreme Court has only once addressed the district courts' power to tax costs, and the majority fails to consider fully the significance of that decision. *Farmer v. Arabian American Oil Company* [62] makes clear that Rule 54(d) authorizes a court, in its discretion, to tax costs in excess of those mentioned in § 1920. As several circuits have noted, it modifies the lingering effect of *Henkel.*[63]

In *Farmer*, no fee-shifting statute applied. The district court had refused to tax as costs litigation expenses for witness travel and overnight transcripts. While the Supreme Court affirmed this disallowance, the Court did not rest its decision on a determination of whether § 1920 permitted these costs or on some other rule limiting the taxation of costs. Instead it relied only on Rule 54(d), saying:

> We do not read [Rule 54(d)] as giving district judges unrestrained discretion to tax costs to reimburse a winning litigant for every expense he has seen fit to incur in the conduct of his case. Items proposed by winning parties as costs should always be given careful scrutiny. . . . [T]he discretion given district

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Ark. 1952); *Andresen v. Clear Ridge Aviation*, 9 F.R.D. 50 (D. Neb. 1949); *Abel v. Loughman*, 1 F.R.D. 734 (E.D. N.Y. 1941); 4 C. Wright & A. Miller Federal Practice and Procedure: Civil § 1044 at 152.

[61] 10 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 2665, at 171 (2d ed. 1983).

[62] 379 U.S. 227, 85 S.Ct. 411, —— L.Ed.2d —— (1964).

[63] *See, e.g., Paschall v. Kansas City Star Co.*, 695 F.2d 322, 338 (8th Cir. 1982), *rev'd on other grounds*, 727 F.2d 692 (1984); *Roberts v. S.S. Kyriakoula O. Lemos*, 651 F.2d 201, 206 (3d Cir. 1981).

> judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute.[64]

The Court's conclusion reveals its premise: Rule 54(d) gives the district court discretion to award costs not enumerated in § 1920.

Although *Farmer* did not involve expert witness fees, the Court noted with approval that the district court denied the excess costs because they were not indispensable to the litigation and had not received prior court approval, which might have kept the costs to a minimum or alerted the parties in advance that they would be taxable.[65] These two considerations—indispensability and prior court approval—have been taken as guidelines by those circuits that permit courts the discretion to tax expert witness fees under Rule 54(d).

The First Circuit has permitted the discretionary award of expert witness fees for courtroom testimony, noting that an express finding that the testimony was indispensable is usually required, but that prior court approval will suffice.[66] Indeed, the First Circuit's leading case reversed an award of attorney's fees under the *Alyeska* standards at the same time that it upheld an award of expert witness fees under *Farmer.*[67]

The Third Circuit, in the maritime tort case of *Roberts v. S.S. Kyriakoula O. Lemos,*[68] expressly permitted the

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[64] *Id.* at 235, 85 S.Ct. at 416.

[65] *Id.* at 233-35, 85 S.Ct. at 415-16.

[66] *Gradmann & Holler GMBH v. Continental Lines, S.A.*, 679 F.2d 272, 274 (1st Cir. 1982); *see also Templeman v. Chris Craft Corp.*, 770 F.2d 245 (1st Cir. 1985) (employment discrimination); *Heddinger v. Ashford Memorial Community Hospital*, 734 F.2d 81 (1st Cir. 1984) (diversity).

[67] *See Gradmann & Holler GMBH v. Continental Lines, S.A.*, 679 F.2d 272, 274 (1st Cir. 1982).

[68] 651 F.2d 201 (3d Cir. 1981).

award of expert witness fees "when the expert's testimony is indispensable to the determination of the case," or "played a crucial role in the resolution of the issues presented." [69] The court wrote:

> While *Farmer* commands perhaps a tight-fisted exercise of discretion in order to insure moderation in the cost of litigation, it does not mandate parsimony to the extent of precluding recovery of legitimate and indispensable litigation expenditures.[70]

Our own circuit has permitted expert witness fees to be awarded not only under § 1988,[71] but in cases of bad faith litigation,[72] and when, after prior court approval, the testimony proved indispensable to the determination of the case.[73]

The Sixth Circuit has affirmed an award of expert witness fees in a civil rights case, rejecting the argument that such fees were expenses incidental to § 1988 attorney's fees, and awarding them instead "pursuant to the court's sound discretion under" § 1920 and Rule 54(d).[74] The

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[69] *Id.* at 206.

[70] *Id.*

[71] *Berry v. McLemore*, 670 F.2d 30, 34 (5th Cir. 1982); *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981).

[72] *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 441 F.2d 631, 637 (5th Cir.), *cert. denied*, 404 U.S. 941, 92 S.Ct. 285, 30 L.Ed.2d 255 (1971). *But see Baum v. United States*, 432 F.2d 85 (5th Cir. 1970) (Rule 54(d) discretion limited to statutory witness fees); *United States v. Kolesar*, 313 F.2d 835 (5th Cir. 1963); *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962) (no discretion to award expert witness fees).

[73] *Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1100 (5th Cir. 1982) (Clayton Act).

[74] *Northcross v. Board of Ed. of Memphis City Schools*, 611 F.2d 624, 640 (6th Cir. 1979); *see also Smillie v. Park Chemical Co.*, 710 F.2d 271 (6th Cir. 1983) (SEC action); *but see Murphy v. International Union of Operating Engineers*, 774 F.2d 114 (6th Cir. 1985) (LMRDA action).

district court had reduced the amount allowed to one-half the amount claimed because the expense had been incurred without prior approval of the court and was excessive.

The Eighth Circuit, like the Third, has permitted the award of expert witness fees adopting *Farmer* guidelines.[75] Although it did so in an antitrust case arising under the Clayton Act, the court relied only on *Farmer*, holding that "Fed. R. Civ. P. 54 authorizes district judges to award costs not specifically enumerated in 28 U.S.C. § 1821 [or §1920]." It has reached the same result in cases that do not involve a fee-shifting statute.[76]

The Ninth Circuit permits the award of expert witness fees if the testimony is necessary to the case and the fees are reasonable. In *Thornberry v. Delta Airlines, Inc.*, it describes the court's authority to award these costs as limited to "special circumstances." However, it interprets these circumstances broadly, considering "the reasonable needs of the party in the context of the litigation." [77] While *Thornberry* was a civil rights case, to which § 1988 was applicable, the court relied only upon Rule 54(d).

The District of Columbia Circuit has found no authority for a court to award excess expert witness fees but

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[75] *Paschall v. Kansas City Star Co.*, 695 F.2d 322, 338-39 (8th Cir. 1982), *rev'd on other grounds en banc*, 727 F.2d 692, *cert. denied*, —— U.S. ——, 105 S.Ct. 222 (1984); *see also Hiegel v. Hill*, 771 F.2d 358 (8th Cir. 1985) (§ 1983); *Easley v. Anheuser-Busch, Inc.*, 758 F.2d 251 (8th Cir. 1985) (§ 1983); *Coleman v. Omaha*, 714 F.2d 804, 809 (8th Cir. 1983) (employment discrimination); *Linneman Construction, Inc. v. Montana-Dakota Utilities Co., Inc.*, 504 F.2d 1365 (8th Cir. 1974).

[76] *Nemmers v. City of Dubuque*, 764 F.2d 502, 506 (8th Cir. 1985) (zoning action). *See also Nebraska Public Power Dist. v. Austin Power, Inc.*, 773 F.2d 960 (8th Cir. 1985) (diversity).

[77] 676 F.2d 1240, 1245 (9th Cir. 1982), *vacated on other grounds*, 461 U.S. 952, —— S.Ct. ——, —— L.Ed.2d —— (1983); *see also Shakey's Inc. v. Covalt*, 704 F.2d 426 (9th Cir. 1983) (trademark infringement). *But see Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 224 & n.67 (9th Cir. 1964).

qualified this rule by an exception "if the district court approves in advance or requires the testimony of a specially qualified witness who will furnish information or evidence not otherwise reasonably accessible to the court and whose appearance is determined to be critically important to the case." [78]

Other circuits have denied the award of expert witness fees in excess of the amount allowed ordinary witnesses by 28 U.S.C. § 1821.[79] The Second [80] and Fourth [81] Circuits have addressed the issue only in antitrust cases and have held, I believe incorrectly, that the Clayton Act's allowance of "cost of suit" does not permit awards in excess of § 1920 costs. The Seventh Circuit recognizes that courts "retain some discretion to tax costs not specifically provided for by statute," citing *Farmer*, but limits that discretion to unspecified "exceptional circumstances." [82] Finally, the Tenth [83] and Eleventh [84] Circuits

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[78] *Quy v. Air America, Inc.*, 667 F.2d 1059, 1066 n.11 (D.C. Cir. 1981) (diversity); *See also Moore v. National Association of Securities Dealers, Inc.*, 762 F.2d 1093, 1128 n.20 (D.C. Cir. 1985) (employment discrimination); *Postow v. OBA Federal Savings & Loan Ass'n*, 627 F.2d 1370 (C.A.D.C. 1980) (Truth in Lending Act).

[79] *See* Bartell, *supra* note 5, at 591.

[80] *Berkey v. Eastman Kodak*, 603 F.2d 263 (1974), *cert. denied*, 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980); *Trans World Airlines v. Hughes*, 449 F.2d 51, 81 (2d Cir. 1971).

[81] *Speciality Equipment & Machinery Corp. v. Zell Motor Car Co.*, 193 F.2d 515, 520-21 (4th Cir. 1952).

[82] *Illinois v. Sangama Construction Co.*, 657 F.2d 855, 865 n.14 (7th Cir. 1981); *see also Sanchez v. Schwartz*, 688 F.2d 503 (7th Cir. 1982) (§ 1988); *Adams v. Carlson*, 521 F.2d 168 (7th Cir. 1975) (prisoner's suit); *Fey v. Walston & Co.*, 493 F.2d 1036 (7th Cir. 1974) (SEC action).

[83] *Cleverock Energy Corp. v. Trepel*, 609 F.2d 1358, 1363 (10th Cir. 1979) (diversity); *but see Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983) (awarding expert witness fees under § 1988 as incidental expense).

[84] *Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519 (11th Cir. 1985). *Kivi v. Nationwide Mutual Insurance Co.*, 695 F.2d 1285, 1289 (11th Cir. 1983). *But see Dowdell v. City of Apopka, Fla.*, 698 F.2d 1181, 1188-89 (11th Cir. 1983) (awarding all out-of-pocket expenses under § 1988).

have categorically denied district courts the discretionary authority to award witness fees in excess of the amounts specified in § 1821, although they have not extended this limitation to § 1988 cases.

In sum six circuits permit the award of expert witness fees when the testimony is indispensable or when advance court approval is obtained, in accordance with the Supreme Court's dictum in *Farmer*, and as we have held in prior cases. Two circuits categorically deny district courts any authority under the Clayton Act, and two deny them any authority under Rule 54(d), to award costs not provided for by statute. But none engrafts the *Alyeska* attorneys'-fee exceptions onto a rewritten § 1920.

Pursuant to Rule 54(d), the district court should be permitted in its discretion, sparingly exercised, to award a prevailing party expert witness fees, reasonable in amount, for courtroom testimony in cases in which the testimony was indispensable to resolution of the case. District courts should be given discretion to adopt local rules limiting the award of such fees to cases in which prior court approval was given.

VII.

In *Gibbons*, the district court carefully reviewed the evolving law in our circuit, and in the Third, Sixth, and Eighth Circuits before concluding, as do I, and as did those circuits, that *Farmer* has modified what remains of *Henkel*, and that expert witness fees in excess of those allowed by statute may be awarded if they were indispensable to the litigation. The district court noted that, "It is particularly appropriate to award defendants the costs of indispensable expert witness testimony under the circumstances of this case, where the defendants were

forced to defend an extremely burdensome, vexatious, and totally meritless array of antitrust claims." [85] It carefully reviewed the importance of the testimony of each of the three expert witnesses whose fees were sought to be taxed and concluded that the testimony of only two was "crucial and indispensable to the presentation of the defendants' case." It also examined the reasonableness of the fees of those two witnesses before ordering that they be taxed. The *Gibbons* court applied the right test and, in a carefully reasoned exercise of its discretion, reached a result that I would affirm.

VIII.

The costs of litigation, as we all know, have become staggering. A plaintiff may put a defendant or a defendant may put a plaintiff to a tremendous amount of expense, apart from the cost of obtaining an attorney's services, in defending or prosecuting a case. One cause of this expense is the unavoidable necessity of expert witness testimony to establish or rebut many legal claims, especially those raised in civil rights and antitrust cases. A study cited by a student writer suggests that expert testimony controls the outcome in two-thirds of all cases, and that expert witness fees are second only to attorney's fees as the largest litigation expense.[86]

A rule that denies a prevailing party who is entitled to attorney's fees the right to recover the other costs for which his lawyer bills him gives the vindicated party only half a victory. Although the victor in litigation is not entitled to spoils, he ought at least be able to invoke the court's discretion to make him whole.

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[85] *J.T. Gibbons v. Crawford Fitting Co.*, 102 F.R.D. 73, 83 (E.D. La. 1984).

[86] *See* Note, Contingent Fees for Expert Witnesses in Civil Litigation, 86 Yale L.J. 1680, 1680 n.1, 1681 n.4 (1977).

APPENDIX E

1. Federal Rules of Civil Procedure, Rule 54(d) provides:

Except when express provision therefore is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

2. 28 U.S.C. Section 1920 provides:

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

3. 28 U.S.C. Section 1821 provides:

(a)(1) Except as otherwise provided by law, witness in attendance at any court of the United States, or before a United States Magistrate, or before any person authorized

to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.

(2) As used in this section, the term "court of the United States" includes, in addition to the courts listed in section 451 of this title, any court created by Act of congress in a territory which is invested with any jurisdiction of a district court of the United States.

(b) A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

(c) (1) A witness who travels by common carrier shall be paid for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled to and from such witness's residence by the shortest practical route in going to and returning from the place of attendance. Such a witness shall utilize a common carrier. A recipt of other evidence of actual cost shall be furnished.

(2) A travel allowance equal to the mileage allowance which the Administrator of General Services has prescribed, pursuant to section 5704 of title 5, for official travel of employees of the Federal Government shall be paid to each witness who travels by privately owned vehicle. Computation of mileage under this paragraph shall be made on the basis of a uniformed table of distances adopted by the Administrator of General Services.

(3) Toll charges for toll roads, bridges, tunnels, and ferries, taxicab fares between places of lodging and carrier terminals, and parking fees (upon presentation of a valid parking receipt), shall be paid in full to a witness incurring such expenses.

(4) All normal travel expenses within and outside the judicial district shall be taxable as costs pursuant to section 1920 of this title.

(d) (1) A subsistence allowance shall be paid to a witness (other than a witness who is incarcerated) when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.

(2) A subsistence allowance for a witness shall be paid in an amount not to exceed the maximum per diem allowance prescribed by the Administrator of General Services, pursuant to section 5702(a) of title 5, for official travel in the area of attendance by employees of the Federal Government.

(3) A subsistence allowance for a witness attending in an area designated by the Administrator of General Services as a high-cost area shall be paid in an amount not to exceed the maximum actual subsistence allowance prescribed by the Administrator, pursuant to section 5702(c)(B) of title 5, for official travel in such area by employees of the Federal Government.

(4) When a witness is detained pursuant to section 3149 of title 18 for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section.

(e) An alien who has been paroled into the United States for prosecution, pursuant to section 212(d)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(d)(5), or an alien who either has admitted belonging to a class of aliens who are deportable or has been determined pursuant to section 242(b) of such Act (8 U.S.C. 1252(b)) to be deportable, shall be ineligible to receive the fees or allowances provided by this section.

No. 86-322 (2)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CRAWFORD FITTING COMPANY,
CAPITAL VALVE & FITTING COMPANY, INC.,
THOMAS A. READ & COMPANY,
FRED A. LENNON and ROBERT D. JENNINGS,
Petitioners,

v.

J.T. GIBBONS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals erred in holding that, in the absence of statutory authority, district courts may not award witness fees under 28 U.S.C. § 1920 in violation of the restrictions of 28 U.S.C. § 1821?

PARTIES TO THE PROCEEDINGS

The Petition for Certiorari contains an accurate description of the parties to the proceedings.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Plaintiff/Respondent J.T. Gibbons is a distributor of pipe fittings for oil rigs. Defendants/Petitioners are the company that manufactures those fittings (Crawford Fitting Company), Crawford's owner (Fred A. Lennon), two companies that distribute the fittings (Capital Valve & Fitting Company, Inc. and Thomas Read & Company), and Capital's owner (Robert D. Jennings).

In 1977, Gibbons began selling Crawford fittings, which it acquired through Capital and sold in Scotland. Gib-

bons' sales competed with sales made by Crawford distributors in Scotland. In 1978, Capital refused to sell any more products to Gibbons. When Gibbons approached Read, Read also refused to deal. After unsuccessful negotiations, Gibbons brought suit against petitioners for breaches of federal antitrust laws. *See J.T. Gibbons, Inc. v. Crawford Fitting Company*, 704 F.2d 787, 789-90 (5th Cir. 1983).

The suit alleged violations of 15 U.S.C. §§ 1 and 2. It claimed that: (1) defendants' refusal to deal constituted an unreasonable restraint of trade; (2) all defendants conspired to eliminate Gibbons' competition in the North Sea market; (3) Crawford set resale prices for its distributors; and (4) Crawford's subsidiary and manufacturing companies engaged in horizontal price fixing. *J.T. Gibbons, supra*, 704 F.2d at 790. Petitioners counterclaimed for malicious prosecution. *Id.*

At the close of trial, the trial court directed a verdict against J.T. Gibbons on its antitrust claims. Petitioners' claim of malicious prosecution was allowed to go to the jury, which returned a verdict finding that Gibbons' suit was not malicious prosecution. *See J.T. Gibbons, Inc. v. Crawford Fitting Company*, 565 F. Supp. 167 (E.D. La. 1981).

On appeal to a panel of the Fifth Circuit, the Court of Appeals affirmed the directed verdict on the antitrust claims, assuming that violations had occurred but finding that Gibbons had failed to prove damages. *See* 704 F.2d at 792 ("we have assumed for purposes of this discussion, that the defendants did in fact conspire to eliminate Gibbons' competition."). It also affirmed the jury's verdict denying the malicious prosecution claim. *Id.* at 799.

Following the affirmance, petitioners presented a bill of costs to the district court, including a claim for expert witness fees in excess of those allowed by the applicable statute (28 U.S. § 1821). The district court awarded the

requested costs, including all of the requested expert witness fees. *J.T. Gibbons, Inc. v. Crawford Fitting*, 102 F.R.D. 73 (E.D. La. 1984). Petn at 13a-45a.

On appeal, the issue presented was whether, in the absence of statutory authorization, a district court can award as "costs" expert witness fees. The Court of Appeals followed the rule established in *Henkel v. Chicago, S.P., Minn. & O. Ry. Co.*, 284 U.S. 444 (1932), where this Court held:

> Under [the predecessor statute to 28 U.S.C. § 1821] additional amounts paid as compensation, or fees, to expert witnesses cannot be allowed or taxed in cases in the federal courts.
>
> . . .
>
> The Congress has dealt with the subject comprehensively and has made no exception of the fees of expert witnesses.

Henkel, 284 U.S. at 446, 447.

The Court of Appeals remanded with instructions to recalculate the witness fees in accord with 28 U.S.C. § 1821. *J.T. Gibbons v. Crawford Fitting Company*, 760 F.2d 613 (5th Cir. 1985). Petn at 5a-12a. A petition for certiorari was filed by Crawford et al., *Crawford Fitting Company v. J.T. Gibbons, Inc.*, Supreme Court No. 85-248, but the Fifth Circuit subsequently sua sponte granted rehearing *en banc* and the petition was dismissed pursuant to Rule 53. *Crawford Fitting v. J.T. Gibbons, Inc.*, —— U.S. ——, 106 S. Ct. 212, 88 L.Ed.2d 182 (1985).

On rehearing *en banc*, the *en banc* court reached the same result, holding that district courts may not violate the restrictions of 28 U.S.C. § 1821 in awarding expert witness fees under 28 U.S.C. § 1920. *J.T. Gibbons v. Crawford Fitting Company*, 790 F.2d 1193 (5th Cir. (1986) (*en banc*). Petn at 1a-4a.

This petition followed.

SUMMARY OF ARGUMENT

The issue here is whether, in the absence of statutory authority, a party may recover expert witness fees in excess of those provided in 28 U.S.C. § 1821. The law on this issue is clear. No such fees are recoverable. This Court stated the law in *Henkel*, reaffirmed the underlying principle in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), and the rule has been steadily followed. Further, Congress had as least twice within the last ten years reaffirmed its understanding that specific congressional authority is required to allow district courts to tax expert witness fees as costs. Part I *infra*.

The "split" identified by petitioners is not significant. Three of the allegedly "conflicting" circuits do not in fact conflict with the rule in *Henkel* or with this case. Only the Third and Eighth Circuits arguably have a conflicting rule. Even within those circuits, the "split" is not significant. A search of district court and court of appeals cases reveals only eight reported cases in the last ten years in which the position of the Third and Eighth Circuits has resulted in a final judgment taxing expert witness fees. Part II *infra*.

The alleged importance of the split is further diminished by the fact that any knowledgeable counsel wishing to recover expert witness fees will seek prior court approval of the expenditures pursuant to Civil Rule 706, thus obtaining explicit statutory authority to tax the expert's fees as costs pursuant to 28 U.S.C. § 1920(6). This basic bit of planning should prevent the issues in the split from ever arising. Part III *infra*.

Petitioners' attempts to justify certiorari under the rubric of public policy must be rejected in light of this Court's decisions, Congressional enactments, and the public policies expressed therein. Part IV *infra*.

ARGUMENT

I. SETTLED LAW PROVIDES THAT EXPERT WITNESS FEES MAY NOT BE TAXED BEYOND THOSE FEES AUTHORIZED BY STATUTE

Federal Rule of Civil Procedure 54(d) provides that costs shall be awarded "as of course to the prevailing party, unless the court otherwise directs." Congress has provided, in 28 U.S.C. § 1920(3), that taxable costs may include "fees and disbursements for printing and witnesses." The amount of taxable witness fees is then set by 28 U.S.C. § 1821, which provides:

> Except as otherwise provided by law, a witness in attendance at any court of the United States . . . shall be paid the fees and allowances provided by this section.

The remainder of § 1821 specifies the daily fee that may be paid, and the manner in which travel and lodging expenses must be computed.

In *Henkel v. Chicago, St. Paul, Minn. & Omaha Ry. Co.*, 284 U.S. 444 (1932), this Court considered whether a federal district court could avoid the statutory amount limits of § 1821 in award expert witness fees. This Court held it could not:

> The Congress has dealt with the subject comprehensively and has made no exception of the fees of expert witnesses.

Henkel, supra, 284 U.S. at 447. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), reaffirmed a similar rule with respect to attorney fees—statutory authorizations (or equitable exceptions not at issue here) are required or the fees may not be awarded.

Thus, absent other statutory authorization, the fees of all witnesses, including expert witnesses, are limited to those set forth in § 1821. *Accord, e.g., Kivi v. Nationwide Mut. Ins. Co.*, 695 F.2d 1285, 1289 (11th Cir. 1983);

In re Air Crash, 687 F.2d 626, 631 (2d Cir. 1982); *Quy v. Air America, Inc.*, 667 F.2d 1059, 1066-67 (D.C. Cir. 1981); *State of Illinois v. Sangamo Construction Co.*, 657 F.2d 855, 865 (7th Cir. 1981); *Bosse v. Litton Unit Handling Systems*, 646 F.2d 689, 695 (1st Cir. 1981); *Cleverock Energy Corp. v. Trepel*, 609 F.2d 1358, 1363 (10th Cir. 1979), *cert. denied*, 446 U.S. 909 (1980); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 309 n.75 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093, (1980); *Wheeler v. Durham City Board of Education*, 585 F.2d 618, 624 (4th Cir. 1978); *Ott v. Speedwriting* Publishing Co., 518 F.2d 1143, 1149 (6th Cir. 1975); *Twentieth Century Fox v. Goldwin*, 328 F.2d 190, 224 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964).

Over the years, Congress has repeatedly affirmed its understanding that specific congressional enactment in addition to § 1821 is required to allow the taxation of expert witness fees. Thus, for example, the Equal Justice Act, 28 U.S.C. §§ 2401 et seq., provides that in suits against the United States: "a judgment for c[illegible], as enumerated in section 1920 of this title" may be [illegible] against the United States. In so providing, however, Congress clearly understood and relied on the fact that § 1920 costs do *not* include private expert witness fees in excess of the amount set forth in § 1821. Addressing such fees, Congress in 1980 adopted an amendment to § 2412 providing that for a trial period of four years, a party prevailing against the United States could recover "*in addition to*" the costs enumerated in § 1920 "fees and other expenses . . . [including] the reasonable expenses of expert witnesses." 28 U.S.C. § 2412(d)(1)(A) and (d)(2)(A), P.L. 96-481 (1980). Congress thus reemphasized its intent that authorization in addition to 28 U.S.C. §§ 1920 and 1821 is required before private expert witness expenses may be taxed.

Similarly, in 1978, Congress again confirmed that expert witness fees are not generally taxable when it created a new subsection to 28 U.S.C. § 1920 authorizing taxation of costs for "compensation of court appointed experts." 28 U.S.C. § 1920(6). If expert witness fees were generally taxable, this amendment would not have been necessary. *See State of Illinois v. Sangamo Construction Co., supra*, 657 F.2d at 865.

II. THE LONG-STANDING RULE HAS NOT BEEN SERIOUSLY AFFECTED BY THE POSITION OF THE THIRD AND EIGHTH CIRCUITS

In their original petition for certiorari, filed under Supreme Court No. 85-248 and dismissed under Rule 53, petitioners argued only that the Third and Eighth Circuits had rules contrary to the decision here. Notwithstanding an attempt to create a different impression now, that continues to be correct—only two circuits deviate from *Henkel*.

The First, Second, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and District of Columbia Circuits all follow *Henkel*.[1] Petitioners attempt to create a different impression by quoting from the *en banc* dissent. *See*

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[1] *See, e.g.*, in order according to circuit, *Bosse v. Litton Unit Handling Systems*, 646 F.2d 689, 695 (1st Cir. 1981); *Templeman v. Chris Craft Corporation*, 770 F.2d 245, 250 (1st Cir.), *cert. denied*, —— U.S. ——, 106 S. Ct. 571, 88 L.Ed.2d 556 (1985); *In re Air Crash*, 687 F.2d 626, 631 (2d Cir. 1982); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 309 n.75 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *Wheeler v. Durham City Board of Education*, 585 F.2d 618, 624 (4th Cir. 1978); *Specialty Equipment & Mach. Corp. v. Zell Motor Car Co.*, 193 F.2d 515, 521 (4th Cir. 1952); *J.T. Gibbons v. Crawford Fitting Co.*, 790 F.2d 1193 (5th Cir. 1986); *Ott v. Speedwriting Publishing Co.*, 518 F.2d 1143, 1149 (6th Cir. 1975); *Illinois v. Sangamo Construction Co.*, 657 F.2d 855, 865 (7th Cir. 1981); *Twentieth Century Fox v. Goldwin*, 328 F.2d 190, 224 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964); *Cleverock Energy Corp. v. Trepel*, 609 F.2d 1358, 1363 (10th Cir. 1979), *cert. denied*, 446 U.S. 909 (1980); *Kivi v. Nationwide Mut. Ins. Co.*, 695 F.2d 1285, 1289 (11th Cir. 1983); *Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519, 1526 (11th Cir. 1985); *Quy v. Air America, Inc.*, 667 F.2d 1059, 1066-67 (D.C. Cir. 1981).

Petn at 6-8. The cases cited by the dissent, however, do not create the alleged conflict.

The First Circuit cases cited by the dissent hold merely that prior court approval can authorize taxing of fees (conceded under every rule),[2] or that although the rules on "obstinacy" might allow an award of expert witness fees, the district court did not abuse its discretion in refusing to do so.[3] None of the cases purports to overrule *Bosse v. Litton Unit Handling Systems*, 646 F.2d 689 (1st Cir. 1981), which holds that expert witness fees cannot exceed those specified in 28 U.S.C. § 1821.

Of the two Sixth Circuit cases purportedly creating a conflict, one was a "common fund" attorneys fee case that does not address expert witness fees,[4] and the other simply stated that "the standards for awarding such costs are well settled and need not be repeated here."[5] Neither case purports to challenge the well-settled Sixth Circuit rule that expert witness fees are not taxable under 28 U.S.C. § 1920 in excess of the amounts set forth in 28 U.S.C. § 1821. *See Ott v. Speedwriting Publishing Co.*, 518 F.2d 1143, 1149 (6th Cir. 1975). Nor have these cases in any way suggested to the district courts that *Henkel* has been abandoned by the Sixth Circuit. *See, e.g., Grider v. Kentucky & Indiana Terminal R. Co.*, 101 F.R.D. 311, 312 (W.D. Ky. 1984); *Mastrapas v. New York Life Ins. Co.*, 93 F.R.D. 401, 407 (E.D. Mich. 1982).

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[2] *Gradmann & Holler GMBH v. Continental Lines, S.A.*, 679 F.2d 272, 274-75 (1st Cir. 1982); *Templeman v. Chris Craft Corporation*, 770 F.2d 245, 250 (1st Cir.), *cert. denied*, —— U.S. ——, 106 S. Ct. 571, 88 L.Ed.2d 556 (1985).

[3] *Heddinger v. Ashford Memorial Community Hospital*, 734 F.2d 81, 86 (1st Cir. 1984).

[4] *Smillie Park Chemical Co.*, 710 F.2d 271 (6th Cir. 1983).

[5] *Northcross v. Board of Ed.*, 611 F.2d 614, 640 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

In the Ninth Circuit, one cited case contains dicta on the potential to award costs with prior court approval and in exceptional circumstances,[6] and the other, a 42 U.S.C. § 1988 case, talks about discretion to award fees,[7] but neither case remotely suggests that it is overruling the settled rule of *Twentieth Century Fox v. Goldwin*, 328 F.2d 190, 224 (9th Cir. 1964) that expert witness fees in non-civil rights cases, in particular in antitrust cases, are limited to those set forth in 28 U.S.C. § 1821.

In short, petitioners were correct the first time. The only potential conflict is with panel decisions in the Third and Eighth Circuits. As a practical matter, that "split" simply is not of a magnitude sufficient under any circumstances to justify certiorari.

An analysis of the importance or lack of importance of the "split" must begin with a definition of the situations affected by the "split." A large number of the reported cases discussing expert witness fees involve specific statutory provisions separate from 28 U.S.C. § 1920(3) and § 1821, such as the Civil Rights Fees Act, 42 U.S.C. § 1988, *see, e.g., Heiar v. Crawford County*, 746 F.2d 1190, 1203-04 (7th Cir. 1984), *cert. denied*, —— U.S. ——, 105 S. Ct. 3500, 87 L.Ed.2d 631 (1985); *Ramos v. Lamm*, 713 F.2d 546, 559 (10th Cir. 1983), or the Equal Justice Act, 28 U.S.C. § 2412, *see United States v. 341.45 Acres of Land*, 751 F.2d 924 (8th Cir. 1984). Cases holding that expert witness fees may or not be awarded under the Civil Rights Fees Act or the Equal Justice Act are not relevant to or affected by the "split" that petitioners seke to have reviewed.

This case does not address awards of fees under any statute specifically authorizing such awards. The only

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[6] *Shakey's Inc. v. Covalt*, 704 F.2d 426, 437 (9th Cir. 1983).

[7] *Thornberry v. Delta Airlines, Inc.*, 676 F.2d 1240, 1245 (9th Cir. 1982), *vacated on other grounds*, 461 U.S. 952, *on remand*, 709 F.2d 524 (9th Cir. 1983).

issue here is whether expert witness fees may be awarded in the *absence* of specific statutory authorization.[8]

A search of the district court and court of appeals cases in the Third and Eighth Circuits over the last ten years shows that the practical effect of the split presented here is *de minimis*. Actual awards of expert witness fees by the courts of the Third and Eighth Circuits in the absence of statutory authority are so rare as to be insignificant. The first case creating the split is *Welsh v. Likins*, 68 F.R.D. 589 (D. Minn.), *aff'd*, 525 F.2d 987 (8th Cir. 1975). In the ten years since that decision, respondent can find only eight cases (one of which was

[8] This case's companion case on *en banc* review, *International Woodworkers of America v. Champion International Corporation*, 790 F.2d 1174 (5th Cir. 1986) (*en banc*), *cert. pending* No. 86-328, similarly presents only the 28 U.S.C. § 1821 question presented by *Crawford Fitting*, although it also discusses the authorizations of 42 U.S.C. § 1988 in dicta. In *International Woodworkers*, a successful civil rights defendant failed to meet the requirements of *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), for recovery of fees under 42 U.S.C. § 1988. *See* Petn in *Crawford Fitting* at 48a. Champion failed to appeal the determination that it had not met the *Christiansburg* requirements. *Id.* The only issue before the *en banc* court was whether Champion was entitled to expert witness fees under 28 U.S.C. §§ 1920 and 1821—the same issue presented here. Thus, the Question Presented in the *International Woodworkers* Petition for Certiorari is the same as the Question Presented here, *see International Woodworkers* Petn at p. i, and that case is equally uncertworthy.

Both the majority and the dissent in *International Woodworkers* engaged in dicta concerning whether 42 U.S.C. § 1988 authorizes expert witness fee awards in other situations, with the majority stating that it does not. That issue, however, was not before the court. For all of the case's broader dicta, the court does not decide whether, for example, a successful plaintiff may recover expert witness fees under § 1988. Indeed, given that (as the *International Woodworkers* dissent points out) every circuit allows recovery of costs of litigation under § 1988, it must be expected that the Fifth Circuit, when directly confronted with the issue, will follow suit. Thus, even were the dicta of *International Woodworkers* presented in Champion's Petition for Certiorari, that petition would be uncertworthy.

vacated *en banc* on other grounds) in which expert witness fees have been awarded outside the context of a specific statutory authorization.[9]

The theories of the panel decisions in the Third and Eighth Circuits have yet to be reviewed *en banc* and tested against the majority position of the other circuits. In the meantime, the effects of the "split" identified by petitioners are not significant enough to justify certiorari.

III. MOST ATTORNEYS WILL AVOID ANY PROBLEMS WITH TAXATION OF COSTS BY OBTAINING PRIOR COURT APPROVAL OF EXPERT WITNESSES

The significance of the "split" over expert witness fees under 28 U.S.C. § 1920(3) is further diminished by the fact that in a well-planned case (whatever the circuit), the issue should never come up. In 1978, Congress adopted 28 U.S.C. § 1920(6), which provides:

[9] *Nebraska Public Power District v. Austin Power, Inc.*, 773 F.2d 960, 975 (8th Cir. 1985); *Nemmers v. Dubuque*, 764 F.2d 502, 506-7 (8th Cir. 1985); *Paschall v. Kansas City Star*, 695 F.2d 322 (8th Cir. 1982), *rev'd en banc*, 727 F.2d 692 (8th Cir. 1984), *cert. denied*, —— U.S. ——, 105 S. Ct. 222, 83 L.Ed.2d 152 (1985) (reversing the liability finding and vacating the award of costs without discussion); *Coleman v. City of Omaha*, 714 F.2d 804, 809 (8th Cir. 1983); *Roberts v. S.S. Kyriakoula D. Lemos*, 651 F.2d 201, 205 (3rd Cir. 1981); *Sack v. Carnegie Mellon University*, 106 F.R.D. 561, 564 (W.D. Pa. 1985); *Dekro v. Stern Bros. & Co.*, 571 F. Supp. 97, 107 (W.D. Mo. 1983); *Fahey v. Carty*, 102 F.R.D. 751, 753 (D.N.J. 1983). In addition, the Third and Eighth Circuits contain two cases involving enforcement of the civil rights laws and attorney fee awards under 42 U.S.C. § 1988 in which the courts awarded expert witness fees under 28 U.S.C. § 1920 without directly tying that award to the statutory authorization or Congressional directives of § 1988. *See Commonwealth of Pennsylvania v. O'Neill*, 431 F. Supp. 700, 713 (E.D. Pa. 1977); *Bolden v. Pennsylvania State Police*, 491 F. Supp. 958 (E.D. Pa. 1980). Two additional cases involved remands for consideration of awards, one case where fees were granted and one where they were denied. *Hiegel v. Hill*, 771 F.2d 358, 360 (8th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S. Ct. 800, 88 L.Ed.2d 776 (1986); *Crues v. KFC Corporation*, 768 F.2d 230, 234 (8th Cir. 1986).

A judge or clerk of any court of the United States may tax as costs the following:

(6) Compensation of court appointed experts . . .[10]

Under 28 U.S.C. § 1920(6) and Fed. R. Evid. 706, the trial judge may, at the request of a party or at his or her own volition, appoint expert witnesses whom he or she believes to be essential to the case, including expert witnesses nominated by one of the parties, and may tax the compensation of that expert witness as a cost.

Court appointment of a witness nominated by one of the parties can and has been used to establish a statutory basis for later taxation of that witness's compensation as costs. *See United States Marshal's Service v. Means*, 741 F.2d 1053, 1057-58 (8th Cir. 1984). This is also done, on occasion, under the rubric of the Court's "inherent power" to tax expert witness fees through prior approval. *See Gradmann & Holler GMBH v. Continental Lines, S.A.*, 679 F.2d 272, 274-75 (1st Cir. 1982); *Cagle v. Cox*, 87 F.R.D. 467, 471-72 (E.D. Va. 1980); *Pizarro-de Ramirez v. Grecomar Shipping Agency*, 82 F.R.D. 327 (D. P.R. 1976) (dicta); *Quetel v. Querrand*, 278 F. Supp. 341 (D. V.I. 1968) (dicta).

Thus through 28 U.S.C. § 1920(6), a party can find the explicit statutory authorization that is needed to tax expert witness fees as costs.

The criteria of approving an expert witness under § 1920(6) and the Eighth and Third Circuits' tests for awarding expert witness fees outside statutory authority are effectively the same—the witness must be essential to the case. The sole distinction is that for an attorney to use the authorization of § 1920(6), he or she must plan ahead.

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[10] Congress obviously used the word "compensation" to distinguish this payment from the "witness fees" authorized by § 1920(3) and set as to amount by § 1821.

Assuming that attorneys plan ahead before hiring expensive experts, all of the cases that might have existed under the "split" will be resolved under 28 U.S.C. § 1920(6). The "split" in the circuits thus becomes important only for the practitioner who forgets to seek prior court approval. Certiorari is not needed in such a situation.

IV. THERE IS NO POLICY GROUND FOR GRANTING CERTIORARI

Finally, Petitioners argue that public policy requires that this Court grant certiorari and reverse the court of appeals, so that antitrust plaintiffs will be deterred from bringing suits they may lose. *See* Petn at 13-18. This plea for certiorari is misplaced.

First, petitioners carefully ignore the fact that the federal antitrust laws already contain a section defining under what circumstances attorneys' fees and costs may be recovered in an antitrust action. *See* 15 U.S.C. § 15. This statute does *not* allow recovery of expert witness fees, even for a prevailing plaintiff. *See Trans World Airlines Inc. v. Hughes*, 449 F.2d 51, 81 (2d Cir. 1971), *rev'd on other grounds sub nom. Hughes Tool Co. v. TWA*, 409 U.S. 363 (1973), and cases cited therein.

Second, the fees and costs provisions of the antitrust laws are a decision made by Congress to encourage plaintiffs and thus discourage anti-competitive behavior. *See, e.g., Knutson v. Daily Review, Inc.*, 479 F.Supp. 1263, 1267 (N.D. Cal. 1979). Petitioners' argument that certiorari should be granted to deter plaintiffs by making them liable for expert witness fees is no more than a demand that this Court overturn congressionally-established policy on antitrust law.

Finally, because the law against award of expert witness fees under the antitrust laws is so clear, petitioners' public policy argument must paint with much broader brush, and ask this Court to massively revise 28 U.S.C.

§ 1920 and hold that in *all cases* expert witness fees are recoverable as costs. Petitioners argue, in effect, that certiorari should be granted to make a major revision in the American rule on attorneys' fees and costs. This Court has repeatedly held, however, that if such a revision is to be made, it must be made by Congress.

As the *en banc* Fifth Circuit recognized, under the American Rule, except where authorized by Congress or by the three narrow exceptions of *Aleyska, supra* (common fund, willful disobedience, or bad faith), all litigants must bear their own costs of litigation. Here although petitioners devote a large portion of the petition to allegations that petitioner's suit was unfounded, the jury found that the suit was brought in good faith. There is, further, no willful disobedience or common fund involved here. Accordingly, absent a major revision of the American Rule, the Fifth Circuit was correct.

This Court has consistently rejected pleas to depart from this rule. *See Summit Valley Industries, Inc. v. Local 112*, 456 U.S. 717, 721 (1982) (refusing to expand NLRA § 303 to allow recovery of attorneys' fees); *F.D. Rich Co., Inc. v. United States*, 417 U.S. 116, 128-31 (1973) (no award of attorneys' fees under 40 U.S.C. § 207b(a), issues properly addressed by Congress); *Fleishmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 719-20 (1966) (absent specific statutory language awarding fees, none will be awarded under 15 U.S.C. §§ 1116, 1117).

Congress has set the public policies concerning the award of expert witness fees. If petitioners have a plea, it is to Congress for statutory amendments, not to this Court for certiorari.

CONCLUSION

For the reasons stated above, the Petition for Certiorari should be denied.

DATED this 22nd day of September, 1986.

Respectfully submitted,

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No. 86-322

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CRAWFORD FITTING COMPANY,
CAPITAL VALVE & FITTING COMPANY, INC.,
THOMAS A. READ & COMPANY,
FRED A. LENNON and ROBERT D. JENNINGS,
Petitioners

v.

J. T. GIBBONS, INC.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE PETITIONERS

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January 15, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether or not district courts have any discretion under Fed. R. Civ. P. 54(d) to tax cost, such as expert witness fees, beyond the scope of those items listed in 28 U.S.C. §§ 1920 and 1821.

PARTIES TO THE PROCEEDINGS

The parties to these proceedings are petitioners Crawford Fitting Company, Fred A. Lennon, Capital Valve & Fitting Company, R. D. Jennings and Thomas A. Read & Company, Inc. and respondent J. T. Gibbons, Inc.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The memorandum opinion of the district court, reported at 102 F.R.D. 73 (E.D. La. 1984), is reprinted as Appendix C to the Petition for Writ of Certiorari filed herein. The May 17, 1985 opinion of a panel of the Court of Appeals for the Fifth Circuit, 760 F.2d 613 (5th Cir. 1985), is reprinted as Appendix B to the Petition for Writ of Certiorari. The June 2, 1986 *en banc* opinion of the Court of Appeals for the Fifth Circuit,

790 F.2d 1193 (5th Cir. 1986), is reprinted as Appendix A to the Petition for Writ of Certiorari.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) in that a Petition for Writ of Certiorari, filed on August 29, 1986, within ninety days of the judgment appealed from, was granted by this Court by order dated December 1, 1986. Jurisdiction of the district court was based upon Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26.

STATUTES INVOLVED

The statutes involved herein, 28 U.S.C. § 1920, 28 U.S.C. § 1821 and Rule 54(d) of the Federal Rules of Civil Procedure, are reprinted as Appendix E to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Plaintiff J. T. Gibbons, Inc., filed the original action in this case in federal district court, claiming that petitioners engaged in numerous violations of the federal antitrust laws, 15 U.S.C. §§ 1 and 2, including a group boycott, horizontal and vertical price fixing, market allocation, predatory pricing, monopolization, and attempt and conspiracy to monopolize. The trial court directed a verdict in favor of defendants on all of plaintiff's claims, and entered judgment dismissing the complaint at plaintiff's cost. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 565 F. Supp. 167 (E.D. La. 1981). The Fifth Circuit Court of Appeals affirmed the trial court's rulings in all respects. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 704 F.2d 787 (5th Cir. 1983).

Defendants filed a bill of costs with the Clerk of Court, who taxed the costs for audio-visual equipment and assistance, copies of depositions, and daily trial

transcripts. The Clerk declined to tax as costs expert witness fees incurred by defendants, and attorneys' fees and expenses incurred in connection with depositions taken by defendants in Scotland. After a *de novo* review, the district court awarded defendants those costs taxed by the Clerk, as well as a portion of defendants' expert witness fees, and attorneys' fees and expenses incurred in connection with the Scotland depositions. The court's award of expert witness fees as costs was based upon the exercise of its discretion under Rule 54(d) of the Federal Rules of Civil Procedure. App. C at 13a-45a.

On May 17, 1985, a panel of the Fifth Circuit generally sustained the district court's award of costs, except that it reversed the award of expert witness fees in excess of the ordinary per diem and travel allowance prescribed by 28 U.S.C. § 1821. App. B at 5a-12a. Subsequently, the Fifth Circuit *sua sponte* ordered a rehearing *en banc*, thereby vacating the panel opinion. On the same day, it granted a rehearing *en banc* in *International Woodworkers of America, AFL-CIO and its Local No. 5-376*, 752 F.2d 163 (5th Cir. 1985) (hereinafter "*IWA*"). The prevailing defendant in *IWA*, an employment discrimination suit, had requested expert witness fees as a litigation expense incidental to an award of attorneys' fees authorized by the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988. The district court found that that statutory provision did not authorize such an award, and a panel of the Fifth Circuit had affirmed this ruling. 752 F.2d 163 (5th Cir. 1985).

On June 2, 1986, in a majority opinion authored by Judge Carolyn Dineen Randall, the *en banc* court in the *IWA* case, adopting by analogy the rule with respect to awards of attorneys' fees set forth in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), held that expert witness fees in excess of the

per diem and travel allowance sepcified in 28 U.S.C. § 1821 for ordinary witnesses are not generally taxable as costs. App. D at 46a-82a.

On the same date, the Fifth Circuit applied its sweeping new rule to the instant case, reversing the district court's award of expert witness fees to the prevailing defendants in excess of the amount allowed by 28 U.S.C. § 1821. App. A at 1a-4a. It did so although costs in the instant suit were sought on a completely different basis from that in the *IWA* case. The *IWA* case involved a request by a prevailing defendant for an award of expert witness fees incidental to an award of attorneys fees under the Civil Rights Attorney's Fee Award Act, 42 U.S.C. § 1988. In the instant case, the prevailing defendants in an antitrust lawsuit invoked the trial court's general discretion under Fed. R. Civ. P. 54(d) to recover costs, including expert witness fees. The *en banc* panel applied the same rule to both cases without distinction.

On August 29, 1986, defendants herein filed a timely Petition for Writ of Certiorari. This Honorable Court granted defendants' Petition (together with a Petition for Writ of Certiorari filed by the prevailing defendant in *IWA*) on December 1, 1986, ordering further that the two cases be consolidated for hearing.

SUMMARY OF ARGUMENT

The trial court's taxation of a portion of the fees paid by defendants for its expert witnesses was well within the discretion afforded it under Rule 54(d) of the Federal Rules of Civil Procedure. Historically, courts in equity possessed discretion to award costs, including costs not specifically authorized by statute. Courts sitting at law, however, had power only to award costs specifically delineated by statute. With the merger of law and equity under the Federal Rules of Civil Procedure in 1938, federal courts were accorded in all actions the combined powers of both courts of equity and law. Thus, under Rule 54(d), federal district courts are invested with equitable discretion in the taxation of costs not specifically authorized by statute.

This Court has confirmed that Rule 54(d) invests federal district courts with discretion, albeit sparing, to award costs not specifically authorized by statute, and has established general guidelines for the exercise of such discretion in *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964). When requested to tax such costs against the losing party, this Court has admonished the trial courts to give careful scrutiny to such items and to exercise their discretion "sparingly." The ruling of the trial court below conformed strictly with this standard and constitutes a proper exercise of Rule 54(d) discretion.

The Fifth Circuit's reliance on *Henkel v. Chicago, St. Paul, Minnesota & Omaha Ry.*, 284 U.S. 444 (1932), which decision predates the Federal Rules of Civil Procedure, is misplaced. This Court's decision in *Henkel* stands only as a statement of the district court's power to award costs at law at a time when the practice of the district courts was bifurcated between law and equity. *Henkel* is not relevant to the issue of a district court's discretion under Rule 54(d), which incorporated the powers of the courts at law and in equity.

The decision of the Fifth Circuit below not only ignores the significance of applicable legal precedent, but also turns its back on strong policy considerations favoring retention of district court discretion in the taxation of costs. It is a well publicized fact that the caseload of the federal district courts has reached an all-time high. A litigant with a legally dubious claim has little to lose by pressing forward with it, and there are more attorneys than ever eager to urge him on. Under the standard contingency fee arrangement, this litigant's out-of-pocket

outlay is guaranteed to be minimal. And the American Rule ensures that he will not be responsible for his opponent's attorneys fees if he loses.

The problem is most acute in the area of complex commercial litigation, where jury confusion must be considered a given. In such cases, the defendant faces a no-win situation. Even if he is fully vindicated at trial, his victory is often hollow, given the fees and costs incurred in the process. The discretion afforded district courts under Rule 54(d) served as an important deterrent against the prosecution of totally meritless claims, and the stringent standard fashioned by this Court for its exercise adequately safeguards proper use of that discretion. The opinion of the Fifth Circuit below, robbing the district courts of even this narrow discretion, is an unwarranted incursion on the power of the district courts to do justice.

ARGUMENT

I. THE FEDERAL DISTRICT COURTS HAVE DISCRETION TO AWARD THE FEES OF EXPERT WITNESSES AS TAXABLE COSTS UNDER RULE 54(d) OF THE FEDERAL RULES OF CIVIL PROCEDURE

The question presented by the instant case is whether the trial court below abused its discretion under Rule 54(d) of the Federal Rules of Civil Procedure by taxing as costs certain expert witness fees, in excess of the statutory allowances set forth in 28 U.S.C. §§ 1920 and 1821. Though relatively narrow on its face, this question implicates the proper interpretation of two federal statutes, and the precedent established by this Court. Furthermore, its resolution should take into account the enormous costs of modern complex litigation, and the appropriate allocation of such costs in individual cases.

Analysis of the trial court's decision and the circuit court's subsequent reversal must begin with the language of the relevant statutes. Federal Rule of Civil Procedure

54(d) provides that "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law." 28 U.S.C. § 1920 reads as follows:

> A judge or clerk of any court of the United States *may* tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) *Fees and disbursements for printing and witnesses;*
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses and costs of special interpretation services under section 1828 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment decree.
>
> Emphasis added.

"Fees . . . for . . . witnesses," 28 U.S.C. § 1920(3), include the minimal statutory per diem and travel allowance contained in 28 U.S.C. § 1821. App. E at 83a-85a.

Interpreting these statutes, the *en banc* panel of the Fifth Circuit below held that 28 U.S.C. §§ 1920 and 1821 provide the *exclusive* source of power for the district court to award expert witness fees, except when one of three narrow equitable exceptions applies. App. D at 50a. Petitioners respectfully submit that the *en banc*

panel erred. The district court's allowance of certain expert witness fees as costs constituted an appropriate exercise of the discretion afforded it under Rule 54(d) and this Court's standard for the exercise of that discretion, as set forth in *Farmer v. Arabian Oil Co.*, 379 U.S. 227 (1964).

A. The Adoption Of The Federal Rules Of Civil Procedure Effected A Merger Of Equity And Common Law Practice, And Confirmed The Discretionary Power Of Federal District Courts To Award Costs In All Cases

The power of the courts to tax costs historically depended on whether the court was sitting in law or equity. At early common law, the taxation of costs was unknown. Through a series of statutes, costs in actions at law became available in England. By contrast, courts of chancery always possessed a broad discretion in the allowance of costs, both in considering whether to award costs to a prevailing party at all and, if so, the types of costs to be awarded. 10 C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure* §§ 2665, 2668 (2d ed. 1983) (hereinafter "*Wright and Miller*"); 6 *Moore's Federal Practice*, ¶ 54.70[5] (2d ed. 1948) (hereinafter "*Moore's Federal Practice*"). This distinction was originally retained by the federal courts of the United States.

The power of the federal district courts to award costs was recognized by implication in the First Judiciary Act of September 24, 1789, Chap. 20, 1 Stat. at L. 73, U.S.C. title 28, § 141. At equity, federal district courts retained a broad discretion to grant reimbursement for costs not included in the ordinary taxable costs recognized by statute, as "part of the original authority of the chancellor to do equity in a particular situation." *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939); *Newton v. Consolidated Gas Co.*, 265 U.S. 78 (1924); *Ex Parte Peterson*, 253 U.S. 300 (1920).

By the Process Act of September 29, 1789, Chap. 21, 1 Stat. at L. 93, Congress provided that the "rate of fees . . . in the circuit and district courts, in suits at common law," should be the same as were "used" or "allowed" in state courts. It thus became the practical usage of the federal district courts at law to conform to state laws as to costs, when no express provision therefor had been made by Congress. The Fee Act of February 26, 1853, Chap. 80, Stat. at L. 161 (predecessor of 28 U.S.C. § 1920) set a uniform scale for certain costs in the federal courts. This Court held early on that the Fee Act of 1853 did not affect the equitable power of the federal courts to award expenses beyond the scope of that statute. *See Sprague v. Ticonic National Bank*, 307 U.S. 161, 166 at n.2 (1939).

The civil procedure in the district courts was thus divided into two practices: one for actions at law and another for suits in equity. Each was governed in part by federal statutes, but generally the practice at law conformed to state practice by virtue of the Conformity Act of 1872, and federal practice in equity was governed by the Equity Rules of 1912. In 1934, Congress enacted the Rule-Making Act, 28 U.S.C. § 723, which repealed the Conformity Act and returned to this Court its rule-making power.[1] 28 U.S.C. § 723(b); 2 *Moore's Federal Practice* ¶ 1.02a (2d ed. 1948). Congress further provided that the Court could at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both. 28 U.S.C. § 723(c).

The Court chose to act on this authorization and, in the Federal Rules of Civil Procedure, effective September 16, 1938, it promulgated a unified system of rules for

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[1] This statute is now incorporated into 28 U.S.C. § 2072 which provides that the "Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions."

cases in equity and actions at law. *See* Fed. R. Civ. P. 2. Under the present single form of action, "all relief, formerly legal and equitable, to which a proponent of a cause of action is entitled is obtained in the single civil action." 2 *Moore's Federal Practice* § 2.06. Rule 54(d) of the Federal Rules of Civil Procedure now defines the power of a federal court to tax costs—a power which incorporates previous federal court powers both at law and equity. *Wright & Miller* § 2665.

B. This Court Has Confirmed The Discretionary Power Of The Federal District Courts Under Rule 54(d), And Established Standards For The Exercise Of That Discretion

Since the adoption of Rule 54(d), this Court has considered the scope of the district courts' power to tax costs under Rule 54(d) in only one case: *Farmer v. American Oil Co.*, 379 U.S. 227 (1964). As Judge Rubin observed in his dissent to the holding of the appellate court below, "the majority failed to consider fully the significance of that decision." App. D at 76a. As for Respondent Gibbons, its Brief in Opposition to the Petition for Writ of Certiorari fails to mention *Farmer* entirely. It is respectfully submitted that the legal and policy issues involved herein are identical to those considered by this Court in *Farmer*, and that the holding in that case controls the disposition of this one.

The trial court in *Farmer* refused to tax as costs expenses for witness travel from Arabia and for overnight transcripts. The trial court so ruled as an exercise of judicial discretion, expressly declining to rely upon the 100-mile limitation federal courts had traditionally imposed upon their power to assess transportation costs of witnesses brought from without the judicial district.[2]

[2] Under Rule 45 of the Federal Rules of Civil Procedure, a district court's power to compel attendance extends only 100 miles. Relying on this rule, district courts had traditionally declined to tax as costs the travel expenses of witnesses from beyond 100 miles.

The prevailing defendant appealed from the ruling denying the costs sought to be taxed. Before the Second Circuit Court of Appeals, plaintiff argued that the 100-mile rule completely barred the district court from taxing against him costs incurred by defendants in bringing witnesses from Arabia to this country. Commenting that the case "present[ed] a question of importance in the administration of civil litigation", 324 F.2d 359, 361, the appellate court, in a 5-4 decision, held that the 100-mile rule was inapplicable as a restraint upon the exercise of judicial discretion in the assessment of costs for witnesses brought to trial.

The appellate court fully considered the policy implications of its holding, finding that:

> [T]he 100-mile rule [cannot] be defended as an allocation of the expenses of litigation in keeping with the practice of our courts to let such expenses fall on the party who incurs them. Fees for legal services are usually the largest single expense of litigation. In most cases, the prevailing party must pay such fees himself, even if he has come into court only to defend against an unjust accusation. There is no reason to extend this practice further.
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> . . . .
>
> It has been suggested that the 100-mile rule serves a salutary purpose insofar as it erects some protection from the impecunious litigant who might otherwise hesitate to institute litigation in the fear that, if unsuccessful, he may bear the burden of transporting the defendant's witnesses. It seems plain, however, that any such solicitude for the rule is ill-founded. There may be cases in which the fair administration of justice requires that the losing party not be taxed to the full extent of the cost of producing witnesses for the other party. But it surely cannot be said that there will never be a case in which

the losing party, in the interests of justice, should bear such costs . . . . Indeed, adherence to a rigid limitation . . . is more likely to work to the detriment of litigants with meagre financial resources than a rule which leaves the allocation of costs to be determined according to the circumstances of each case.

. . . .

We do not hold that the full measure of travel expenses *must* be taxed against the unsuccessful party in each and every cause; we merely affirm the *power* of a federal district judge to exercise his discretion in the allocation of such costs. In exercising that discretion, the trial judge may well take account of the relative financial resources of the parties and the ability of the unsuccessful litigant to bear the costs of the litigation, where the action has been prosecuted in good faith.

324 F.2d 359 at 363.

Compare 324 F.2d 359 at 365 (J. Smith, dissenting) ("This decision . . . abandons the traditional scheme of costs in American courts to turn in the direction of the English practice in making the unsuccessful litigant pay his opponent's litigation expense as well as his own.")

On writ of certiorari to this Honorable Court, the appellate court's ruling was affirmed. The Court dealt first with petitioner's contention that the district court was "wholly without power to tax costs against him for expenses incurred in bringing witnesses in from Arabia". Writing for the majority, Justice Black flatly disagreed, stating that:

> [I]t is sufficient here to point to Federal Rule of Civil Procedure 54(d), which provides that "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party

> unless the court otherwise directs. . . ." *While this Rule could be far more definite as to what "costs shall be allowed," it quite clearly vests some power in the court to allow some "costs." We therefore hold that the district judge was correct in treating this case as an appeal to his discretion.*
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> 379 U.S. at 235, emphasis added.

Secondly, the Court found that the trial judge's refusal to tax the costs of foreign travel was an appropriate exercise of his discretion, observing in this respect as follows:

> We do not read [Rule 54(d)] as giving district judges unrestrained discretion to tax costs to reimburse a winning litigant for every expense he has seen fit to incur in the conduct of his case. Items proposed by winning parties as costs should always be given careful scrutiny. Any other practice would be too great a movement in the direction of some systems of jurisprudence that are willing, if not indeed anxious, to allow litigants costs so high as to discourage litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claims to be. *Therefore, the discretion given district judges to tax costs should be sparingly exercised with references to expenses not specifically allowed by statute.*
>
> *Id.*, emphasis added.

As Judge Rubin concisely comments in his dissent below, the "Court's conclusion reveals its premise: Rule 54(d) gives the district court discretion [albeit sparing] to award costs not enumerated in § 1920." App. D at 77a.

In a separate opinion concurring only with the majority's result, Justice Goldberg disagreed "that the 100-mile rule is a matter for even the narrow discretion which the Court would allow the lower federal courts to exercise." 379 U.S. at 255. He reasoned that the 100-

mile rule, a standard created by jurisprudence and applied by "the overwhelming weight of authority," constituted a *de facto* rule of court within the meaning of the exception to Rule 54(d), providing that "except when express provision therefor is made either in a statute of the United States or in these rules", district courts have discretion to award costs to a prevailing party. 379 U.S. at 256. Moreover, Justice Goldberg decried the policy implications of the majority opinion, expressly endorsing and quoting the dissenting opinions of the appellate court below concerning allocation of costs in the United States.

Writing in dissent, Justice Harlan, joined by Justice Stewart, stated that "the foundation of today's decision" was the "scope of the discretion of a district judge acting within his powers." 379 U.S. at 240. It was their position that the only issue which should properly have been before the Court was the power of the district judge to tax travelling expenses beyond 100 miles.

Following the majority's decision in *Farmer*, several circuit courts have held that Rule 54(d) affords the federal district courts discretion to award expert witness fees beyond those specified by 28 U.S.C. §§ 1920 and 1821.

In *Paschall v. Kansas City Star Co.*, 695 F.2d 322 (8th Cir. 1982), *rev'd on rehearing on other grounds*, 727 F.2d 692 (8th Cir. 1984), the Eighth Circuit Court of Appeals held that the language from *Farmer* quoted above "authorizes district judges to award costs not specifically enumerated in 21 U.S.C. § 1821." 695 F.2d at 338. That court has approved the discretionary taxation of expert witness fees as costs upon a trial court finding that such expert testimony is "crucial" or "indispensable" to the determination of the case. *Id.* at 399. Like the instant case, *Paschall* was a complex anti-

trust lawsuit. The court in *Paschall* found that the expert testimony concerning competitive impact was "the most important issue" in the case, and affirmed an award of expert witness fees as costs. *Id.*

The Third Circuit Court of Appeals, in *Roberts v. S.S. Kyriakoula D. Lemos*, 651 F.2d 201 (3d Cir. 1981), after quoting the language from *Farmer* relied upon by the Eighth Circuit in *Paschall*, reached the same conclusion:

> *Farmer* appears to hold that Rule 54(d) authorizes district judges to exercise discretion—albeit "sparing"—to award costs not specifically enumerated in § 1821. The Court seems concerned to avoid taxation of unnecessary and possibly vexatious costs accumulated by a prevailing party. Hence the reference to a national policy in favor of restrained award of costs. It is important to note that the Court based its interpretation of Rule 54(d) not on a *Henkel*-type theory of statutory preclusion of costs not listed in § 1821, but on policy considerations militating against award of unenumerated costs. A district court should therefore carefully scrutinize the prevailing party's bill of costs in order to assure that any award will compensate only those expenditures necessary to the litigation. While *Farmer* commands perhaps a tight-fisted exercise of discretion in order to ensure moderation in the cost of litigation, it does not mandate parsimony to the extent of precluding recovery of legitimate and indispensable litigation expenditures. We therefore agree with the District of Minnesota and the Eighth Circuit that *Farmer* affords a district court equitable discretion to award expert witness fees when the expert's testimony is indispensable to determination of the case.
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> 651 F.2d at 206.

Other circuit courts have endorsed rules permitting the discretionary award of expert witness fees as costs in certain circumstances. In his dissenting opinion below,

Judge Rubin summarized the positions of these courts as follows:

> The *FIRST CIRCUIT* has permitted the discretionary award of expert witness fees for courtroom testimony, noting that an express finding that the testimony was indispensable is usually required, but that prior court approval will suffice.
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> . . . .
>
> The *SIXTH CIRCUIT* has affirmed an award of expert witness fees in a civil rights case, rejecting the argument that such fees were expenses incidental to [42 U.S.C.] § 1988 attorney's fees, and awarding them instead "pursuant to the court's sound discretion under", § 1920 and Rule 54(d). The district court had reduced the amount allowed to one-half the amount claimed because the expense had been incurred without prior approval of the court and was excessive.
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> . . . .
>
> The *NINTH CIRCUIT* permits the award of expert witness fees if the testimony is necessary to the case and the fees are reasonable. In *Thornberry v. Delta Airlines, Inc.*, it describes the court's authority to award these costs as limited to special circumstances. However, it interprets these circumstances broadly, considering "the reasonable needs of the party in the context of the litigation." While *Thornberry* was a civil rights case, to which § 1988 was applicable, the court relied only upon Rule 54(d).
>
> The *DISTRICT OF COLUMBIA* has found no authority for a court to award excess expert witness fees but qualified this rule by an exception "if the district court approves in advance or requires the testimony of a specially qualified witness who will furnish information or evidence not otherwise reasonably accessible to the court and whose appearance is determined to be critically important to the case."
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> App. D at 77a-80, citations omitted.

The thread of commonality running through all these decisions is that each of them recognized power of the district courts, under Rule 54(d), to award as costs expert witness fees beyond the amounts stipulated in 28 U.S.C. § 1821 for fees of ordinary witnesses.

II. THE TRIAL COURT BELOW ACTED WITHIN ITS DISCRETIONARY AUTHORITY IN AWARDING AS COSTS THE FEES OF TWO OF THE THREE EXPERT WITNESSES USED BY PETITIONERS AT TRIAL

Expressly relying upon *Farmer* and the opinions of the Third and Eighth Circuit Courts of Appeals, the trial court below carefully considered petitioner's request that it tax the costs of three expert witnesses who testified on their behalf, and exercised its narrow discretion to tax as costs the fees of two of the three experts. The trial judge in the instant case certainly was fully aware of the restrictive standard formulated by this Court in *Farmer*, having by coincidence also served as the district judge whose initial order taxing costs formed the basis of the appeal in that case.

In a very thorough opinion, which the panel of the appellate court below found to be "thoughtful and carefully considered" App. B at 10a, and which the appellate court dissent on hearing characterized as "a carefully reasoned exercise of its discretion", App. D at 82a, the trial court reviewed the testimony of each of the three expert witnesses used by defendants at trial. The fees paid to Dr. Thomas R. Saving in the amount of $37,255.70, and the fees paid to Dr. Philip Robers in the amount of $49,225.00, were taxed as costs upon a specific finding that the testimony of these two experts was crucial and indispensable to the determination of the case. However, the fees in the amount of $64,000.00 paid to Mr. James C. Boland, a certified public accountant, were disallowed in their entirety. Thus, more than 40% of

the total expert witness fees incurred by the defendants were disallowed by the trial court, in the exercise of its discretion. The court further made a specific finding that the charges of the experts whose fees were taxed to the plaintiff as costs were reasonable. App. C at 37a.

The court then went on to observe that it was:

> particularly appropriate to award defendants the costs of indispensable expert witness testimony under the circumstances of this case, where defendants were forced to defend an extremely and burdensome, vexatious, and totally meritless array of antitrust claims.
>
> App. C at 36a.

In this connection, the court adverted to the fact that the defendants had been subjected to "abusive documentary discovery costing them very considerable expense and inconvenience, and that plaintiff had made scant use of this discovery." *Id.* at n. 22. The court went on to note that:

> Despite the jury verdict against defendants on the counterclaim, the uttter baselessness of plaintiff's antitrust claims and the existence of considerable evidence in the record indicating that plaintiff was using this litigation to obtain a Louisana distributorship, may well constitute "exceptional circumstances" so as to allow the awarding of costs for expert witness testimony under the standard adopted by the District of Columbia Circuit.[3]
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> *Id.* at n. 22.[4]

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[3] *See Quy v. Air American, Inc.*, 667 F.2d 1059, 1066-67 (D.C. Cir. 1981).

[4] Respondent claims the jury found it had prosecuted the lawsuit in good faith. Defendants submit that this overstates the case. The issue of good faith before the jury dealt with the narrow question of whether plaintiff made full disclosure to its attorneys of the fact that it had an alternate source of product from another distributor. The trial court, in denying defendants' motion for judgment notwithstanding the verdict, held there was evidence in the record to support the jury finding that plaintiff made full disclosure of the facts, if not to his originally retained lawyers, then to his subsequently retained attorneys. "The jury's answer . . . [thus] exculpate[d] . . . the plaintiff Gibbons, of any bad faith in their factual disclosures to their attorney." 565 F. Supp. at 187-88. In effect, the court simply held that acting with advice of counsel, after full disclosure to counsel, constitutes a complete defense to a malicious prosecution claim. That does not mean a "totally meritless" claim is necessarily prosecuted in "good faith," simply because a lawyer is willing to pursue it after full disclosure of the facts.

Finally, the court clearly took into account the financial resources of the plaintiff, remarking that:

> The defendants were subjected to massive discovery and gigantic litigation costs by this action. The costs allowed by this decision are small by comparison.
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> . . . .
>
> This case involved multimillion dollar claims of corporations against one another for alleged damages occasioned by their business activities. None of the individuals involved were poor. On the contrary, the evidence indicated they were all highly successful intelligent businessmen. It would be inequitable to relieve plaintiff of the obligation to pay the minimum costs assessed in this case.
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> App. C. at 43a.

Defendants respectfully submit that the trial court's careful assessment of all the foregoing relevant factors and its subsequent award of costs plainly evidence a faithful compliance with this Court's mandate in *Farmer*, and constituted an entirely proper exercise of its discretion under Rule 54(d).

III. THE FIFTH CIRCUIT'S RELIANCE UPON CASE LAW PREDATING ADOPTION OF THE FEDERAL RULES OF CIVIL PROCEDURE IS MISPLACED

With respect to the question presented here, the appellate court below did not examine the trial court's exer-

cise of discretionary authority under Rule 54(d). Instead, it simply held that the trial court had no discretion at all to award expert witness fees as costs in this case, and that the exclusive source of power to award fees of witnesses as costs is 28 U.S.C. §§ 1920 and 1821. Other circuit courts have reached similar conclusions. *See, e.g., Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 801 F.2d 908 (7th Cir. 1986); *Cleverock Energy Corp. v. Trepel*, 609 F.2d 1358, 1363 (10th Cir. 1979); *Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519 (11th Cir. 1985).

The cornerstone of all of these decisions is a misplaced reliance upon the case of *Henkel v. Chicago, St. Paul, Minnesota & Omaha Ry.*, 284 U.S. 444 (1932). Decided in 1932, five years prior to the adoption of the Federal Rules of Civil Procedure, *Henkel* involved a claim under the Federal Employers' Liability Act to recover damages. After prevailing at trial, plaintiff petitioned the district court to include his expert witness fees as taxable costs pursuant to state statute. The district court declined his request and, on appeal, the Eighth Circuit certified to this Court the legal question of whether district courts may apply in cases at law a forum state statute authorizing the award of expert witness fees as costs. Interpreting the statutory predecessor of 28 U.S.C. § 1821, the Court answered this question in the negative. The Court found that in this statute, Congress had comprehensively legislated the costs awardable for witness fees. Accordingly, it concluded that Congress had preempted the field and that district courts were not free to apply state statutes.

Contrary to the holding of the Fifth Circuit in the case at bar, *Henkel* does not dispose of the question now before this Court. *Henkel* was decided before the adoption of the Federal Rules of Civil Procedure, which merged the federal practice in actions at law and equity. It was a case at law and, at that time, courts sitting in

law had no power to award costs not expressly granted by statute. In equity, courts have always retained the power to award costs not specified by statute. *Henkel* stands as a correct statement of the power of a district court in 1932 to tax costs not specifically authorized by statute in cases *at law*. It did not purport to address the separate issue of a district court's authority to award such costs as part of its historic equitable powers, because that issue was not even before the Court on the certified question decided therein. *Henkel* therefore has no bearing upon the issue now before this Court, which involves the *combined* legal and equitable powers of the federal courts, under Rule 54(d), addressed in the *Farmer* case.

The Fifth Circuit declined to regard *Farmer* as an affirmance of the discretionary power entrusted to the district courts by Rule 54(d). Characterizing the Court's clear and unequivocal language to that effect as mere "dicta" [App. D at 56a], the appellate court ruled that the trial court was without discretionary power to tax the expert witness fees at issue herein as costs. Other courts have also employed the "dictum" rubric to circumvent *Farmer*. *See Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 801 F.2d 908 at 910 (7th Cir. 1986). This argument cannot survive a reading of even the very first paragraph of the *Farmer* opinion, which states that:

> The questions presented in this case relate to the power and discretion of a United States district court to tax as costs against the loser in a civil lawsuit expenses incurred by the winner in carrying on the litigation.
>
> 379 U.S. at 228.

As the concurrence and the dissent in *Farmer* made clear, it was the majority's decision to resolve the questions before the Court by affirming the district judge's exercise of his discretion pursuant to Rule 54(d) (when

other, more restrictive avenues were clearly open to it) which formed the focal point of the Court's discussion over the appropriate disposition of the case. It all this discussion were mere dicta, there would have been scant justification for writing the majority opinion, let alone the concurrence and the dissent.

But as other circuits have readily recognized, *Farmer's* treatment of the discretionary power Rule 54(d) affords to trial judges clearly is not dicta. Rather, it is an affirmation of the principle that, when law and equity were merged with the adoption of the Federal Rules of Civil Procedure, Rule 54(d) gave federal courts in all actions the discretion previously afforded only to federal courts exercising equity jurisdiction.

The majority below also relied on two other arguments to bolster its result. First, it found as a matter of statutory construction that 28 U.S.C. § 1920 falls within the exception to Rule 54(d), which provides on its face that the Rule is applicable "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules". The majority thus concluded that 28 U.S.C. § 1920 is the exclusive authority for the award of costs. As Judge Rubin correctly observed in his dissent:

> [s]ection 1920 does not on its face purport to be exclusive . . . Its phrasing is permissive because it was revised, after enactment of the Federal Rules, in recognition of the discretion Rule 54(d) affords.[5] It is not, therefore the kind of "express provision" that is an exception according to the terms of Rule 54(d).
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> App. D at 74a.

[5] 1943 United States Code Congressional Service 1887-88 (80th Cong., 2d Sess.). "Word 'may' was substituted for 'shall' before 'tax as costs,' in view of Rule 54(d) of the F.R.C.P."

Judge Rubin went on to note that the majority rule effectively reduces Rule 54(d) to the level of redundancy, and robs it of any independent force or meaning. *Id.*

Moreover, the majority's emasculation of the Rule's discretionary power is inconsistent with its recognition of three other discreet equitable exceptions to the exclusive operation of § 1920, which are totally without any statutory underpinning. *Id.* Blessing three narrow equitable exceptions to its rule while precluding all other relief does not comport with the most basic principals of rationality. It can only be characterized as arbitrariness—the very antithesis of equity. The majority acknowledges the district courts' equitable power to the extent it recognizes three equitable exceptions to its rule, but beyond these three circumstances arbitrarily cuts off that power. There is no rational basis for the sanction of this equitable power in three narrow circumstances, but in no others.

As final support for its result, the majority reasons that, "because Congress has expressly provided for the award of expert witness fees in some statutes, it must therefore have intended to exclude them in all other instances, and [finds] that the word costs refers only to those limited costs specified in § 1920." App. D at 65a. But the fact that Congress expressly mentioned expert witness fees in some statutes does not necessarily mean they are forbidden in the absence of explicit statutory authorization. All of the statutes cited by the majority and by respondent[6] to illustrate this point were enacted long after Rule 54(d). They therefore cannot be considered determinative of the intent of Congress when it promulgated Rule 54(d), and when it revised § 1920 in view of the discretion which Rule 54(d) afforded the district courts. Furthermore, courts have often taken steps in the exercise of their 54(d) discretion to achieve reasonable and fair results under § 1920. By way of

[6] Brief in Opp. at 6-7.

example, analogy may be drawn to cases in which fees of court-appointed expert witnesses were awarded, *before* 28 U.S.C. § 1920 was amended to add the compensation of a court-appointed expert as a taxable cost.[7]

IV. THE FLEXIBILITY RULE 54(d) AFFORDS IN EACH INDIVIDUAL CASE SERVES AS AN IMPORTANT DETERRENT AGAINST THE PROSECUTION OF TOTALLY MERITLESS CLAIMS

The enormous expense of modern complex litigation has been a matter of great concern to both the Bench and the Bar. Appropriate exercise of the discretionary power of trial courts to allocate costs under Rule 54(d) is a vital tool for balancing the competing interests of permitting free access to the courts while discouraging abuses of the judicial process. Certainly, litigants with meritorious claims should not be discouraged from pursuing their rights for fear of facing a high cost award if they lose. On the other hand, justice and the judicial system are not served when one who brings an entirely nonmeritorious lawsuit may do so with impunity—particularly where the prevailing party is forced to expend tremendous sums in defending against frivolous claims.

The antitrust lawsuit which gave rise to the instant controversy typifies the problem. As the trial court below observed in its opinion granting directed verdicts for Petitioners, the Respondent in this action asserted that Petitioners had committed virtually every offense proscribed by the Sherman Act, including group boycott, refusal to deal, horizontal and vertical price fixing, il-

[7] *See United States v. Articles . . . Provimi*, 425 F.Supp. 228, 231 (D.N.J. 1977) (show cause order proposing to assess each party one-half of the cost of the expert's services in conducting study, preparing report, and testifying); *United States v. R.J. Reynolds Tobacco Co.*, 4126 F.Supp. 313, 316 (D.N.J. 1976) (rejecting the government's argument that federal law precluded it from paying the fees and expenses of a court-appointed expert witness). Cf. *Frazier v. Allen Cast, et al.*, Slip Op. No. 80C 5280 (N.D. Ill., July 30, 1986).

legal data dissemination, horizontal and vertical allocation of territories, predatory pricing, and conspiracy and attempt to monopolize.

After hearing all of the testimony, the trial court granted directed verdicts on all counts for Petitioners and, in its opinion awarding costs to Petitioners, specifically described the panoply of charges brought by Respondent as "an extremely burdensome, vexatious, and totally meritless array of antitrust claims." App. C at 36a. The Fifth Circuit Court of Appeals affirmed the trial judge's directed verdict rulings in all respects, noting that this litigation had been brought basically as a refusal to deal case, even though it was undisputed that the Respondent always had access to the product involved.[8]

In deciding whether or not to press a claim such as the one brought against Petitioners herein, a business manager goes through the normal process of a cost/benefit analysis, weighing the potential risks against the potential returns. Traditionally, the potential risks have been virtually nonexistent. Under the typical contingency fee agreement, the plaintiff is only responsible for routine expenses, which comprise a very small part of the total expenditures involved in pursuing complex litigation. On the other hand, the potential rewards can be astronomical, especially in antitrust cases, where the actual damages awarded are automatically trebled. The incentives are therefore great to pursue even the most marginal of claims.

Although the law provides that the plaintiff bears the burden of proof on each element of its claims, every trial lawyer knows that the average jury assumes the full majesty of the law could not possibly be brought into play unless there is a strong likelihood that someone has

[8] The Fifth Circuit specifically observed that "[t]he *sine qua non* of the injury caused by a refusal to deal would be inability to obtain the product." 704 F.2d 787 at 792.

done something wrong. Moreover, in complex litigation such as antitrust cases, the defense lawyer cannot rely on the jury's instincts for what is right to yield the correct result, because virtually all of the testimony is likely to relate to matters that are entirely beyond the ken of the average juror. Thus, in a case which presents doubtful claims from a legal point of view, the plaintiff's lawyer must focus on getting the case to the jury for a decision (where he knows the marginal nature of the claim will not be at all apparent), and the defense lawyer must concentrate on presenting so complete a case that the judge will feel that it is his obligation to direct a verdict.

Often, extensive expert testimony is the only way for the defense to conclusively demonstrate that a directed verdict is appropriate as a matter of fact and law. For example, Respondent herein made bald allegations charging Petitioners with violations of § 1 and § 2 of the Sherman Act. Dr. Thomas Saving, an expert economist, was retained by Petitioners to analyze the relevant industry. Not only did he testify that the industry is extremely competitive, with very low entry barriers, but he also found that Petitioner Crawford Fitting Company "has a small segment in the industry and completely lacks market power." 565 F.Supp. 167 at 180. Dr. Philip Robers, a supply and transportation expert for Petitioners, was called to testify with respect to Respondent's claim that it had been boycotted. After conducting an exhaustive study of Respondent's purchase orders, invoices, shipping orders and other relevant documents, Dr. Robers reached the following conclusions: first, it was clear that Respondent had never in fact been boycotted because it always had access to as much of the product as it wanted through an alternate source; and second, the Respondent's own records demonstrated conclusively that this alternate source furnished the product at better prices, and with superior delivery times, than Respondent had received from Petitioner. 102 F.R.D. at 86-87.

In response, Respondent Gibbons has argued vehemently that in bringing suit it acted as a private attorney general, and that the assessment of costs against it would deter it and other potential private attorneys general from pursuing alleged antitrust violators. The district court answered this disingenuous plea in the following way:

> [First,] there must be some limits and some discipline applied even to law enforcement in this sense. The defendants were subjected to massive discovery and gigantic litigation costs by this action. The costs allowed by this decision are small by comparison.
>
> . . .
>
> [Second,] . . . the plaintiff in this case was clearly interested in advancing its own financial interests. Far from advancing the public interest, there was considerable evidence in the record indicating that the Keeney's were using this litigation to obtain a Louisiana distributorship from Crawford Fitting Company.
>
> [And third,] . . . the public interest is not served when a complex antitrust case containing all the abstruse verbiage known only to antitrust practitioners, and having no merit whatsoever, is thrust upon our overcrowded court dockets. This is a blatant disservice to the court system and to those litigants whose cases demand attention.
>
> App. C at 43a.

Nonmeritorious cases of this kind are routinely pursued in our legal system because an objective cost/benefit analysis makes them attractive. The United States has the highest ratio of lawyers per capita of any nation in the world, so there is an abundance of attorneys willing to press dubious causes. The legality of contingency fee arrangements, which are forbidden in many other countries, effectively eliminates funding concerns. And finally, there is the "American Rule." No other legal system in the world requires the winner in

litigation to pay his own attorneys' fees. *See* Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 Cal. L. Rev. 792, 798 (1966). But historically that has been the rule in this country: a successful defendant is generally limited to recovering nothing more than routine court costs.

The impetus this blend gives to the filing of tenuous claims is readily apparent in the burgeoning field of complex business litigation. The statistics speak for themselves. In 1968 there were about 71,000 civil cases filed in the federal courts. By 1977, the number had risen to 130,000; by 1980 it was 180,000, and by 1984, the figure was 261,485. ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1984). The latest statistics show that 278,793 civil cases were filed in 1985. FEDERAL JUDICIAL WORKLOAD STATISTICS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1985).

The discretionary power authorized by Rule 54(d) not only permits trial courts to fashion equitable results in individual cases, but it also serves as an important check against gross abuses by litigants and potential litigants. Under the rigid rule adopted by the Fifth Circuit below, the most marginal of lawsuits may be brought at very low risk. Reversal of the Fifth Circuit's holding, and affirmance of the discretionary power which the *Farmer* case held belonged to the trial courts, would have the salutary effect of giving the potential plaintiff with a dubious claim at least a moment's pause to consider the increased risks before leaping into an already congested litigation arena.

The experience in the circuits which have recognized trial court discretion to award expert witness fees under Rule 54(d) clearly shows that this discretionary authorization has been exercised with the greatest restraint. Indeed, Respondent's brief opposing the Petition for Certiorari in this case points out at some length that trial

courts have rarely exercised their authority to tax expert witness fees as costs. Resp.'s Brief in Opp. to Pet. at 10-11. Nothing to date has given any indication that taxation of such fees as costs would be done as a matter of course. The circuit courts which have approved Rule 54(d) discretionary authority, as well as the trial court below, have recognized that *Farmer* mandates a "tight-fisted" approach in assessing the propriety of taxing expert witness fees as costs, and that tight-fisted approach has been uniformly followed and applied.

As a matter of policy and practicality, however, the mere recognition of the trial court's discretionary power under Rule 54(d) on this issue affects the cost/benefit analysis of filing a truly marginal lawsuit in a way that can only promote care and responsibility. And that, in turn, can only promote the efficacy of the judicial system.

CONCLUSION

The decision of the appellate court below flies in the face of this Court's holding in *Farmer*. It is thus bad law. It is also bad policy, because its effect is to strip federal trial courts of their historical discretionary power over cost awards, at the very time when affirmance of such discretionary power is most needed. The appropriate application of this discretionary power at the trial level in the case at bar is a good illustration of the important policy considerations that are served by the *Farmer* standard.

Here Petitioners were put to an enormous expense defending against a "totally meritless" lawsuit. App. C at 36a. In a very thorough and cautious opinion, the trial court held that the testimony of two of the three expert witnesses whose fees were sought to be taxed was "crucial and indispensable." App. C at 38a. Exercising the discretion authorized by *Farmer* under Rule 54(d), the trial court thereupon determined that it would be equitable in this particular case to tax the fees of these two experts to the Respondent as costs.

By investing the trial courts with such discretion, Rule 54(d) provides a measure of flexibility to do justice in the individual case and, concomitantly, a vehicle to deter gross abuses of justice. These twin goals are rooted in the most basic concepts of equity. In *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939), this Court, speaking through Justice Frankfurter, observed that:

> As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility.
>
> 307 U.S. at 167.

Such individualization is exemplified by the opinion of the trial court below. By contrast, the appellate court's decision below rejects trial discretion, and enshrines the sterility cautioned against by Justice Frankfurter in *Sprague*.

Petitioners therefore urge this Honorable Court to reverse the holding of the Fifth Circuit Court of Appeals, and to reinstate the April 2, 1984 memorandum decision of the trial court below, App. C, in its entirety.

Respectfully submitted, this 15 day of January, 1987.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-322

CRAWFORD FITTING COMPANY,
CAPITAL VALVE & FITTING COMPANY, INC.,
THOMAS A. READ & COMPANY,
FRED A. LENNON and ROBERT D. JENNINGS,
Petitioners,

v.

J.T. GIBBONS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE RESPONDENT

INTRODUCTION

At issue here is whether district courts have discretion to award expert witness fees in excess of those allowed by 28 U.S.C. § 1821. This issue was definitively answered in *Henkel v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 284 U.S. 244 (1932), where this Court held that:

> Specific provision as to the amounts payable and taxable as witness fees was made by the Congress as

> early as the Act of February 28, 1799, c. 19, § 6, 1 Stat. 624, 626. *See also*, Act of February 26, 1853, c. 80, § 3, 10 Stat. 161, 167; Rev. Stat. § 848. The statute now applicable is the Act of April 26, 1926, c. 183, 44 Stat. 323. U.S.C. Tit. 28, §§ 600a to 600d. *Under these provisions, additional amounts paid as compensation, or fees, to expert witnesses cannot be allowed or taxed as costs in cases in the federal courts.*

284 U.S. at 446 (emphasis added) (citations omitted), and that:

> The Congress has dealt with the subject comprehensively and has made no exception of the fees of expert witnesses.

284 U.S. at 447.

Petitioners' only argument is that the statute allegedly failed to regulate the award of costs under equity practice, and that the adoption of Federal Rule of Civil Procedure 54(d) granted federal courts these alleged equity powers to award expert witness fees in excess of the statutory allowance.

There are four basic problems with petitioners' argument: (1) it is contrary to the terms of the statute, which from its inception expressly regulated equity courts as well as law courts; (2) it is directly contrary to the case law of equity courts, holding expert witness fees not recoverable in excess of the statutory amounts; (3) it is rejected by *Henkel*, which relied on equity cases in holding expert witness fees not recoverable in excess of the statutory amounts; and (4) it is contrary to this Court's ruling in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), interpreting the same statute and issue presented here.

Congress has repeatedly relied on its ability to pick and choose which cases may include an award of expert

witness fees and which may not.[1] Judicial legislation of a different rule, after 130 years of congressional reliance on congressional control, would substantially disrupt many carefully crafted statutes. Nor is such judicial legislation necessary; where a party believes recovery of expert witness fees is essential, the party may apply for court appointment of the expert, which can provide the requisite authority for taxation of the expert's fees as costs. For these reasons, the decision of the Court of Appeals for the Fifth Circuit should be affirmed.

STATEMENT OF THE CASE

Plaintiff/Respondent J.T. Gibbons, Inc. is a distributor of pipe fittings for oil rigs. Defendants/Petitioners are the company that manufactures those fittings (Crawford Fitting Company), Crawford's owner (Fred A. Lennon), two companies that distribute the fittings (Capital Valve & Fitting Company, Inc. and Thomas Read & Company), and Capital's owner (Robert D. Jennings).

In 1977, Gibbons began selling Crawford fittings, which it acquired through Capital and sold in Scotland. Gibbons' sales competed with sales made by Crawford distributors in Scotland. In 1978, Capital refused to sell any more products to Gibbons. When Gibbons approached Read, Read also refused to deal. After unsuccessful negotiations, Gibbons brought suit against petitioners for breaches of federal antitrust laws. *See J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 704 F.2d 787, 789-90 (5th Cir. 1983).

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[1] Thus, for example, respondent in *Champion International Corp. v. International Woodworkers of America*, No. 86-328, consolidated with this case for argument, will argue that the Civil Rights Act of 1964 and the Civil Rights Attorneys' Fees Act of 1976 authorize a prevailing civil rights plaintiff (but not defendant) to recover expert witness fees. This case, however, involves an antitrust defendant who has no right to recover any costs or fees beyond those authorized by the general cost statutes.

The suit alleged violations of 15 U.S.C. §§ 1 and 2. It claimed that: (1) defendants' refusal to deal constituted an unreasonable restraint of trade; (2) all defendants conspired to eliminate Gibbons' competition in the North Sea market; (3) Crawford set resale prices for its distributors; and (4) Crawford's subsidiary and manufacturing companies engaged in horizontal price fixing. *See J.T. Gibbons, Inc.*, 704 F.2d at 790. Petitioners counterclaimed for malicious prosecution. *Id.*

At the close of trial, the trial court directed a verdict against Gibbons on its antitrust claims. Petitioners' claim of malicious prosecution was allowed to go to the jury, which returned a verdict finding that Gibbons' suit was not malicious prosecution. *See J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 565 F. Supp. 167 (E.D. La. 1981).

On appeal to a panel of the Fifth Circuit, the court of appeals affirmed the directed verdict on the antitrust claims, assuming that violations had occurred but finding that Gibbons had failed to prove damages. *See J.T. Gibbons, Inc.*, 704 F.2d at 792 ("We have assumed for purposes of this discussion, that the defendants did in fact conspire to eliminate Gibbons' competition."). It also affirmed the jury's verdict denying the malicious prosecution claim. *Id.* at 799.

Following the affirmance, petitioners presented a bill of costs to the district court, including a claim for expert witness fees. The antitrust attorneys' fee statute, 15 U.S.C. § 15, allows awards only to prevailing plaintiffs. Thus, petitioners, as antitrust defendants, had no claim for costs outside those allowed in the general cost statutes, 28 U.S.C. §§ 1821 and 1920. The district court, however, awarded petitioners approximately $87,000 in expert witness fees. *J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 102 F.R.D. 73 (E.D. La. 1984); Petn. at 13a-45a.

On appeal, the issue presented was whether a district court may award as costs expert witness fees in excess of the amounts specified in 28 U.S.C. § 1821. The court of appeals followed the rule established in *Henkel v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 284 U.S. 444 (1932), held the expert witness fees not recoverable in excess of the statutory amounts, and remanded with instructions to recalculate the witness fees in accordance with 28 U.S.C. § 1821. *J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 760 F.2d 613 (5th Cir. 1985); Petn. at 5a-12a. A petition for certiorari was filed by Crawford *et al.*, Supreme Court No. 85-248, but the Fifth Circuit subsequently *sua sponte* granted rehearing *en banc* and the petition was dismissed pursuant to Supreme Court Rule 53. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, —— U.S. ——, 186 S.Ct. 568, 88 L. Ed. 2d 182 (1985).

On rehearing *en banc*, the *en banc* court reached the same result, holding that district courts may not violate the restrictions of 28 U.S.C. § 1821 in awarding expert witness fees. *J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 790 F.2d 1193 (5th Cir. 1986) (*en banc*); Petn. at 1a-4a. A petition for certiorari was filed, and certiorari was granted, —— U.S. ——, 93 L. Ed. 2d 573 (1986).

SUMMARY OF ARGUMENT

The law on this issue has long been settled. Part I *infra*. The Fee Act of 1853, 10 Stat. 161 *et seq.* (the "Fee Act"), specified the amount of witness fees that may be awarded as costs, and explicitly provided that "no other compensation shall be taxed or allowed." The Fee Act by its terms applied to all cases, including law, equity, and admiralty. The provisions of the Fee Act have been reenacted without substantive change into their present codification as 28 U.S.C. §§ 1821 and 1920 and Federal Rule of Civil Procedure 54(d). These provisions, like the Fee Act, do not permit the taxation of

expert witness fees beyond the statutorily-prescribed amounts. Part I(A) *infra.*

Equity practice (on which petitioners rely) specifically held that in equity cases expert witness fees may not be taxed beyond the amounts set by statute. Part I(B) *infra.*

This Court in *Henkel v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 284 U.S. 244 (1932), expressly held that expert witness fees may not be awarded beyond those set forth in the statute, and cited in reliance equity cases so holding. Part I(C) *infra.*

The intent of the Fee Act was reaffirmed by this Court in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which held that costs "between solicitor and client" (which category includes attorneys' fees and expert witness fees) may not be recovered in excess of the Fee Act's statutorily-defined amounts. As *Alyeska* explained, the power of courts to award costs between solicitor and client is limited to: (1) awards out of a common fund created by the actions of the prevailing party; (2) awards made because the losing party has wilfully disobeyed a court order; and (3) awards made because the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons; none of which is present here. Part I(D) *infra.*

None of petitioners' attempts to avoid the settled law has any basis. Part I(E) *infra.*

Congress has relied on its ability to control the award of expert witness fees. It has chosen certain instances in which to permit such awards by special statutory enactment, and has declined to so provide in other instances. Judicial legislation creating judicial discretion to make such awards would substantially disrupt many carefully considered congressional decisions. Part II *infra.*

Such judicial legislation is totally unnecessary. If a party wishes to provide for the recoverability of expert witness fees as costs, he or she should apply for prior court appointment of the expert under Federal Rule of Evidence 706 and 28 U.S.C. § 1920(6), which provide for the award of court-appointed expert's fees as costs. Part III *infra.*

Petitioners' policy request for judicial legislation is one that has repeatedly been rejected by this Court. Petitioners' arguments must be made to Congress, not this Court. Part IV *infra.*

ARGUMENT

I. THE LAW GOVERNING AWARDS OF EXPERT WITNESS FEES HAS LONG BEEN SETTLED.

A. The Fee Act of 1853 Prescribes Witness Fees for All Cases.

The history of cost statutes in the United States is discussed in detail in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247-62 (1975). For the purposes of this case, it is sufficient to start with the Fee Act of 1853, 10 Stat. 161-69, in which, as *Alyeska* explained:

> Congress undertook to standardize the costs allowable in federal litigation [and] the result was a far-reaching Act specifying in detail the nature and amount of the taxable items of cost in the federal courts.

Alyeska, 421 U.S. at 251-52.

The Fee Act prescribed precisely and in all instances what fees could be awarded as costs in courts of the United States:

> [I]n lieu of the compensation now allowed by law to attorneys, solicitors, and proctors in the United States courts, the United States district attorneys,

> clerks of the district and circuit courts, marshals, witnesses, jurors, commissioners, and printers, in the several States, *the following and no other compensation shall be taxed and allowed.*

10 Stat. 161 (emphasis added).

The Fee Act by its terms regulated all cases in the United States courts. Certain provisions, such as those for witness fees, applied to all types of cases, while others distinguished among cases in law, equity, and admiralty. Thus, for example, the Fee Act provided for a fee for entry upon the final record of process, pleadings, and decrees in equity and admiralty causes only. *See* 10 Stat. 163. Similarly, one docket fee was allowed for law, equity, and admiralty cases generally, and a different docket fee was provided for admiralty cases when the libellant's recovery was less than $50.00 *See* 10 Stat. 161-62.

With respect to witnesses, in all cases, the Act provided:

> *Witnesses' Fees.* For each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents per mile for travelling from his place of residence to said place of trial or hearing, and five cents per mile for returning.

10 Stat. 167.

As explained in *Alyeska*, the Fee Act was carried forward in the Revised Statutes of 1874, *see* Rev. Stat. §§ 823, 848, and in the Judicial Code of 1911, Judicial Code of 1911 § 297, 36 Stat. 1169, codified as 28 U.S.C. ¶¶ 600, 601. Its substance, without any intent to change the controlling rules, was included in the Revised Code of 1948 as 28 U.S.C. §§ 1920 and 1821. *Alyeska*, 421 U.S. at 255-56 & n.29.[2]

[2] As noted in *Alyeska*, the 1948 Code does not contain the language used in the Fee Act and carried on for nearly 100 years that the fees prescribed in the statute "and no other compensation shall be taxed and allowed," but Congress clearly did not intend any substantive change in not including that language, and no substantive change should be inferred. *See Alyeska*, 421 U.S. at 255-56 n.29 and authorities cited therein. Indeed, in the codification the relevant language (previously contained in Revised Statutes Section 571) is not even listed as "omitted", and the new Section 1821 is specifically described as applying "to witnesses . . . in all United States Courts." *See* House Rept. 80-308 at A-237 (1947).

Over the years, Congress has passed special statutes permitting the award of expert witness fees in special circumstances (*e.g.*, Federal Rule of Evidence 706 and 28 U.S.C. § 1920(6) allowing taxation of court-appointed experts' fees). *See* Part II *infra*. The only change in the general Fee Act provisions, however, has been the adoption of Federal Rule of Civil Procedure 54(d) and amendment of 28 U.S.C. § 1920 to permit the denial (not the increase) of statutorily-authorized fees.

Equity courts had always had the power to deny otherwise awardable fees (although not to increase fees beyond statutorily-defined amounts). *See Cheatham Electric Switching Device Co. v. Transit Development Co.*, 261 F. 792, 796 (2d Cir. 1919); *Bone v. Walsh Construction Co.*, 235 F. 901, 902 (S.D. Iowa 1916). In 1937, this equity power was explicitly adopted by Federal Rule of Civil Procedure 54(d), which provided that costs "shall be allowed as of course to the prevailing party . . . unless the court otherwise directs." In 1946, 28 U.S.C. § 1920 changed its authorization for an award of costs from a mandatory "shall tax as costs" to a discretionary "may tax as costs" to reflect the discretion to deny costs granted by Federal Rule of Civil Procedure 54(d). *See* note following 28 U.S.C. § 1920 (Supp. II, 1946); *Alyeska*, 421 U.S. at 256 n.29.

In short, Congress has, since 1853, regulated the maximum amounts that may be taxed as costs by federal courts for compensation of witnesses. By its terms, the Fee Act applies to all witnesses and to all cases. Con-

gress has at all times been clear in its intent and, indeed, the courts have consistently held that they are bound by the Fee Act in all cases, including equity cases.

B. Equity Practice Specifically Recognized that Expert Witness Fees Are Not Recoverable in Excess of Those Set Forth in the Fee Act.

Petitioners' argument is based entirely upon the premise that equity courts somehow had the power to award expert witness fees in excess of those allowed by the Fee Act. Petitioners, however, cite no case so holding, as indeed they cannot. Equity courts were quite clear on the matter. In the equity case of *Bone v. Walsh Construction Company*, 235 F. 901 (S.D. Iowa 1916), the court was confronted "with the question as to whether or not, in the absence of a statute, the expense for experts in the preparation of a case, and in attendance for the trial, aside from statutory witness fees, can be allowed as costs, either upon dismissal, or upon final decree." *Id.* at 903. The court explained that the powers of equity with regard to the award of costs lay in the ability to apportion them among the parties or reduce the amount authorized by statute, but did not extend to awarding costs in excess of those set forth by statute:

> While there are general expressions that a court of equity has broad powers in the matter of taxation of costs, it will be found, upon examination of these cases, that these expressions relate largely to the apportionment of costs, or to the amount which may be allowed as costs under specific provisions of the statute; but I find no case which specifically holds that a court of equity has power to determine what costs are assessable.

Bone, 235 F. at 902. The court concluded, with extensive citation of authority, that expert witness fees may not be awarded in excess of those permitted by statute. *See id.* at 904.

Cheatham Electric Switching Device Co. v. Transit Development Co., 261 F. 792 (2d Cir. 1919) is similarly on point. *Cheatham Electric* was a bill in equity. *See id.* at 793. The defendant, having been adjudged entitled to costs, requested expert witness fees. Again recognizing that an equity court has discretion to deny otherwise taxable costs, the court held that courts in equity may not, however, exceed the statutory authorizations, and expert witness fees are not among those costs authorized by statute:

> The question of costs first above referred to is this: defendants have twice paid an expert witness a considerable fee, in order that he might testify in the long series of litigations between these parties. It is urged that defendants should be permitted to tax the expert's fee on his second appearance as a disbursement. Allowance of costs, etc., in equity is discretionary, but definition of costs and taxable disbursements is a matter settled by statute or rule or authority, and we hold that expert's fees as witnesses are not legally taxable as costs or disbursements. Ordinary witness fees are taxable under the statute to be sure, but on the theory that the law requires the witness to attend and speak. An expert sells his opinion, as counsel sells his services, and he cannot by law be compelled to testify at all, while an attorney may be compelled to serve. There is considerably less reason for taxing experts' fees than might be urged for taxing the expense of legal counsel.

Id. at 796. *See also, e.g., In re First Bond & Mortgage Co.*, 74 F.2d 930, 932 (5th Cir. 1935); *In re Hines*, 144 F. 147, 150 (D. Ore. 1906); (both holding that Bankruptcy Rule 34, which allowed taxation of "the same costs that are allowed to a party recovering in a suit in equity" did not allow taxation of expert witness fees). *See generally, McIntosh v. Ward*, 159 F. 66, 69 (7th Cir. 1907) ("[T]he discretion of a court of equity does not authorize it to require one party . . . to pay the

other, under the name of costs, items paid from the fund for services and expenses in administering a fund properly in court, nor any other items not within the fee-bill act.").

To the same effect, in other non-law cases, are, *e.g.*, *In re Carolina Cooperage Co.*, 96 F. 604 (E.D. N.C. 1899) ("Extra allowance to expert witnesses fees cannot be allowed or taxed against a losing party in a United States district court sitting in admiralty or bankruptcy, but must be paid, according to the statute, $1.50 per day for actual attendance, and mileage.") (bankruptcy); *The William Branfoot*, 52 F. 390, 395 (4th Cir. 1892) (admiralty).

In short, the courts of the United States were never confused about the intent of the Fee Act of 1853. It was intended to regulate the fees that could be taxed as costs for all witnesses in all cases. Equity courts retained their historic discretion to deny or reapportion costs according to the merits of a case, but they had no authority to award expert witness fees in excess of the fees allowed by statute.

C. The Issue in the Present Case Was Squarely Decided in *Henkel*.

In *Henkel v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 284 U.S. 444 (1932), the Court considered an attempt to avoid the restrictions of the Fee Act of 1853. The case was brought in federal court under the Federal Employers' Liability Act to recover damages for the death of the plaintiff's intestate. Upon obtaining a verdict, the plaintiff asked for an order allowing fees for expert witnesses who had testified at trial. The plaintiff argued that fees could be awarded under Minnesota statutes, and sought to invoke the provision of the Rules of Decision Act, 28 U.S.C. § 725 (current version at 28 U.S.C. § 1652), that:

> The laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States in cases where they apply.

The court of appeals, uncertain as to the answer on this issue, certified the question:

> Has a United States District Court power and authority to allow expert witness fees, and to include the same as part of the taxable costs in a law case, said United States District Court being for and sitting in a State the Courts of which are by a state statute authorized, in their discretion, to allow expert witness fees, and the practice and usage in said state courts being to make such allowance and to include the same in the taxable costs, but there being no such usage and practice in said United States District Court?

Henkel, 284 U.S. at 445.

This Court held that 28 U.S.C. § 725 was, by its terms, inapplicable:

> [T]he Congress has definitely prescribed its own requirement with respect to the fees of witnesses. The Congress has dealt with the subject comprehensively and has made no exception of the fees of expert witnesses. Its legislation must be deemed controlling and excludes the application in the federal courts of any different state practice.

Henkel, 284 U.S. at 447 (citations omitted).

Citing to the Fee Act, as then codified in 28 U.S.C. §§ 600a-600d, the Court held that expert witness fees may not be taxed as costs in excess of the amounts allowed by statute:

> Under these provisions, additional amounts paid as compensation, or fees, to expert witnesses cannot be allowed or taxed as costs in cases in the federal

courts. The *William Branfoot*, 52 F. 390, 395; *In re Carolina Cooperage Co.*, 96 F. 604, 605; *Bone v. Walsh Construction Co.*, 235 F. 901, 903, 904; *Cheatham Electric Co. v. Transit Development Co.*, 261 F. 792, 796.

Henkel, 284 U.S. at 446.

The cases cited for this controlling rule are perhaps familiar. The previous section discussed the holdings of equity courts that expert witness fees may not be taxed in excess of those allowed by the Fee Act of 1853. Those cases included *Bone v. Walsh Construction Co.* and *Cheatham Electric Co. v. Transit Development Co.* These are the very same cases cited by *Henkel* in support of its interpretation of the statute. Indeed, *Henkel* does not cite a single law case for its proposition, but only cases from admiralty, equity, and bankruptcy. Had there been any question in the Court's mind as to the scope of the congressional intent of the Fee Act and its subsequent codifications, the authorities cited would undoubtedly have been different.

In short, this Court in *Henkel* addressed in 1932 the same question that is before the Court today. The Court held, unequivocally, that Congress intended to regulate the fees of expert witnesses and that federal courts are not free to ignore that regulation. In so doing, this Court cited with approval and relied upon cases holding that the equity powers of federal courts provide no different rule. The only development in this area since *Henkel* has been Congress' repeated reliance upon its ability to pick and choose which statutes shall specially provide for expert witness fees and which shall not. *See* Part II *infra*. That development is cause for reaffirmation of *Henkel*, not its rejection.

D. The Rule of *Henkel* Was Reaffirmed in *Alyeska Pipeline Service Co. v. Wilderness Society.*

The intent and effect of the Fee Act was reviewed in detail in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). At issue in that case was the award of counsel fees, as opposed to expert witness fees, but as they were both treated alike under the same statute, and had merely had their provisions spun out into different sections of Title 28, there is no valid ground for distinction. Indeed, unlike most of the other fees regulated by the Fee Act and its subsequent embodiments, counsel fees and expert witness fees were both what was known at common law as "costs between solicitor and client," which were generally not taxable, as opposed to costs "between party and party" (such as docket fees) which generally were taxable. Thus, going back to the very origin of the concept of taxation of costs, attorneys' fees and expert witness fees have always been treated alike.

As found by *Alyeska*, the 1853 Act "specif[ied] in detail the nature and amount of the taxable items of cost in the federal courts." *Alyeska*, 421 U.S. at 252. The Fee Act did not permit the taxing of excess "solicitor and client" costs. *Id.* at 258 n.30. Congress has not since "retracted, repealed, or modified the limitations on taxable fees contained in the 1853 statute and its successors." *Id.* at 260. Just as Congress in the Fee Act extended no "roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted," *id.* at 260, so too Congress has extended no "roving authority" to allow expert witness fees in excess of the amount specifically provided for by statute.

Alyeska also recognized three limited exceptions, relating to protection of a common fund and of the court's process, under which costs "between solicitor and client" might be recovered. As the Court explained, those ex-

ceptions are limited to: (1) recovery from a common fund of the costs of a party preserving or recovering that fund; (2) as a penalty for willful disobedience of a court order; and (3) where the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Alyeska*, 421 U.S. at 257-59.

All of the arguments made here were addressed in *Alyeska* and rejected. None of the limited exceptions recognized in *Alyeska* is applicable here.[3] For all the reasons stated in *Alyeska*, the Fifth Circuit was correct in its holding in this case.

E. None of Petitioners' Attempts to Avoid Settled Law Has Any Basis.

The main argument made by petitioners in this case is that equity courts had some type of undefined power to tax expert witness fees as costs in excess of those allowed by statute, that *Henkel* is somehow distinguishable on that basis, and that Federal Rule of Civil Procedure 54(d) obviates the holding of *Henkel* by awarding this alleged equity power to federal courts.

All of those arguments have been shown conclusively to be unfounded in previous sections of this brief. The Fee Act specifically covered both law and equity; the equity courts repeatedly recognized that fact; *Henkel* not only recognized that fact, it relied on equity cases for its holding; and Rule 54(d) modified the rules as to the award of fees only by adopting the equity discretion to deny fees otherwise awardable, not by importing any alleged right to expand the scope of awardable fees.

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[3] Notwithstanding petitioners' attempt to color this case by arguing that the action was vexatious, that issue was tried to a jury, which found in favor of respondent. The trial court declined to award costs based on any such theory, the court of appeals declined to award costs based on any such theory, and there is certainly no cause for this Court to find such an exception applicable.

Petitioners do not cite a single equity case in which expert witness fees were ever awarded. Nor do any of the cases they do cite provide any support for their argument. *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939), on which they primarily rely, was a "common fund" case, and *Alyeska* expressly so holds. *See Alyeska*, 421 U.S. at 257-58 and n.30.

Newton v. Consolidated Gas Co. of New York, 265 U.S. 78 (1924), was a diversity case[4] in which a bond premium used to create a common fund was held recoverable because it was not otherwise regulated by statute and was recoverable under the usage in the district. Here, of course, the case is not a diversity case, and the award is specifically regulated by statute.

Ex parte Peterson, 253 U.S. 300 (1920), was another diversity case, involving the court's appointment of an auditor to assist the court. The Court held that the cost of an auditor appointed by the court to assist the court is substantively different from expenditures made for the benefit of the parties, *id.* at 316, and that neither the Fee Act of 1853 nor state law (because it was a diversity case) regulated in any way the taxing of the cost of a court-appointed auditor. *Id.* at 317. In the absence of any statutorily-defined amount, the Court held that the fee of a court-appointed auditor could be taxed and apportioned as the court saw fit.

Far from supporting petitioners, *Ex Parte Peterson* defeats their arguments. Here the case is brought under a federal statute, and the Fee Act unquestionably (by its terms and by this Court's holdings) regulates the amount of private expert witness fees that may be taxed as costs. Indeed, *Henkel*, ruling that Congress had definitively regulated the taxation of private expert witness fees, was decided 12 years after *Ex Parte Peterson*, and controls on

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[4] As stated in *Alyeska*, diversity cases are not controlled by the federal costs statute. *See Alyeska*, 421 U.S. at 259 n.31.

the question whether the fees of expert witnesses (as opposed to court-appointed auditors) are controlled by the Fee Act. As the Seventh Circuit explained in *Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 801 F.2d 908, 910-11 (7th Cir. 1986):

> [W]hile Rule 54(d) may conceivably allow the taxation as costs of items omitted by Congress, perhaps inadvertently, from sections 1821 or 1920, witness fees are not an omitted item; they are provided for expressly in both sections. Section 1920 even contains an express provision on expert-witness fees, though not one of which SGE can avail itself.[5]

For all these reasons, *Ex Parte Peterson* provides no support here.

Similarly, *F.D. Rich Co., Inc. v. United States*, 417 U.S. 116 (1974), far from providing support for petitioners' position, undercuts it. As the court held in *F.D. Rich Co.*:

> The perspectives of the profession, the consumers of legal services, and other interested groups should be weighed in any decision to substantially undercut application of the American Rule in such litigation. Congress is aware of the issue. Thus whatever the merits of arguments for a further departure from the American Rule in Miller Act commercial litigation, *those arguments are properly addressed to Congress.*

417 U.S. at 131 (emphasis added). *Accord, Roadway Express, Inc. v. Piper*, 447 U.S. 752, 761 (1980) ("Without any evidence that Congress wished to alter the uniform structure established by the 1853 Act, we are reluctant to disrupt it.").

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[5] The express provision referred to is 28 U.S.C. § 1920(6), implementing Federal Rule of Evidence 706, which allows the taxation of the fees of court-appointed experts "in whatever sum the court may allow." In adopting these provisions, however, Congress clearly chose not to modify the prescribed private expert witness fees of 28 U.S.C. § 1821.

With regard to the various court of appeals cases cited by respondents, many involve the specific statutory authority of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), and the Civil Rights Attorneys' Fee Act of 1976, 42 U.S.C. § 1988, and are simply inapplicable here. The others cannot stand in light of the Fee Act, *Henkel*, and *Alyeska*. Further, those cases are substantially outweighed by the nine circuits that follow *Henkel*.[6]

The only other case relied on by petitioners is *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964). Not even the most twisted reading of *Farmer*, however, can suggest that it overrules or modifies *Henkel* or undercuts *Alyeska*.

In *Farmer*, a party voluntarily transported witnesses from Arabia. Upon prevailing, that party asked for the cost of such transportation under 28 U.S.C. § 1821, which on its face allowed taxation of such costs: "witnesses who are required to travel . . . to and from the continental United States, shall be entitled to the actual expenses of travel." *See Farmer*, 379 U.S. at 322.

Under the statute, the prevailing party was entitled to taxation of costs in the amount of the travel expense

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[6] *See*, in order according to circuit, *Templeman v. Chris Craft Corp.*, 770 F.2d 245, 250 (1st Cir. 1985); *Bosse v. Litton Unit Handling Systems*, 646 F.2d 689, 695 (1st Cir. 1981); *In re Air Crash*, 687 F.2d 626, 631 (2d Cir. 1982); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 309 n.75 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *Wheeler v. Durham City Board of Education*, 585 F.2d 618, 624 (4th Cir. 1978); *Specialty Equipment & Machinery Corp. v. Zell Motor Car Co.*, 193 F.2d 515, 521 (4th Cir. 1952); *J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 790 F.2d 1193 (5th Cir. 1986); *Ott v. Speedwriting Publishing Co.*, 518 F.2d 1143, 1149 (6th Cir. 1975); *Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 801 F.2d 908 (7th Cir. 1986); *Cleverock Energy Corp. v. Trepel*, 609 F.2d 1358, 1363 (10th Cir. 1979), *cert. denied*, 446 U.S. 909 (1980); *Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519, 1526 (11th Cir. 1985); *Kivi v. Nationwide Mutual Insurance Co.*, 695 F.2d 1285, 1289 (11th Cir. 1983); *Quy v. Air America, Inc.*, 667 F.2d 1059, 1066-67 (D.C. Cir. 1981).

from Arabia. Courts, however, had put a gloss on 28 U.S.C. § 1821, holding that where witnesses were imported without prior court authority from beyond the 100 mile mandatory subpoena radius of Federal Rule of Civil Procedure 45(e), the court would not allow travel expenses beyond the cost of going 100 miles. *See* cases cited in *Farmer v. Arabian American Oil Co.*, 324 F.2d 359, 362, 366 (2d Cir. 1963).

Judge Weinfeld followed this rule, exercising his discretion under Rule 54(d) to *refuse* to tax the travel costs even though they were permitted on the face of 28 U.S.C. § 1821:

> Judge Weinfeld "in the exercise of discretion" refused to tax the actual transportation expenses of the witnesses from Arabia, limiting those costs to the per diem fees fixed by law and to expenses for travel for a distance not to exceed 100 miles to and from the courthouse.

Farmer, 379 U.S. at 234.

In upholding Judge Weinfeld's exercise of discretion, the Court merely stated that he was authorized to look to the 100-mile rule gloss on § 1821 in *declining* to tax travel costs that were otherwise apparently authorized by statute:

> We cannot accept either the extreme position of the company that the old 100-mile rule has no vitality for any purpose or Farmer's argument that a federal district court can never under any circumstances tax as costs expenses for transporting witnesses more than 100 miles. In this case, however, where taxation of such expenses is being denied, we need not set out the specific circumstances under which such costs can be taxed nor mark precisely the limits of a district court's power to tax them.

Farmer, 379 U.S. at 232. As discussed in Part I(B), *supra*, equity courts have always had discretion to decline to tax costs or to reapportion statutory costs, but equity courts have never had the power to increase costs

beyond the statutorily provided amounts. *Farmer* approves Judge Weinfeld's exercise of the traditional power to decline to tax costs, as specifically incorporated in Rule 54(d) ("costs shall be allowed as of course . . . unless the court otherwise directs"). Nothing in the case suggests that the court has any power to increase the costs beyond the statutory limits.

II. CONGRESS HAS RELIED ON ITS ABILITY TO CONTROL AWARDS OF EXPERT WITNESS FEES.

The words of this Court in *Alyeska*, describing congressional reliance upon control of awards of costs between solicitor and client, could have been written for this case: "Congress has not repudiated the judicially fashioned [common fund and bad faith] exceptions to the general rule against allowing substantial attorneys' fees; but neither has it retracted, repealed, or modified the limitations on taxable fees contained in the 1853 statute and its successors. Nor has it extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted. What Congress has done, however, while fully recognizing and accepting the general rule, is to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights. These statutory allowances are now available in a variety of circumstances, but they also differ considerably among themselves. . . . Under this scheme of things, it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." *Alyeska*, 421 U.S. at 260-62 (footnotes omitted).

Congress' reliance upon its ability to control the award of expert witness fees is evident throughout the United States Code. One of the most striking examples, of course, is the fact that Congress has expressly provided

for the award of expert witness fees in the limited circumstances where there has been prior court approval and appointment. 28 U.S.C. § 1920(6); Federal Rule of Evidence 706. As the Seventh Circuit explained in *State of Illinois v. Sangamo Construction Co.*, 657 F.2d 855, 865 (7th Cir. 1981):

> Congress made no special provision for a private party's witnesses who are classified as expert witnesse.. But Congress did specify that costs include the expense of court-appointed expert witnesses. 28 U.S.C. § 1920(6). We conclude that congressional silence regarding privately retained expert witnesses means that expenses incurred by private parties to retain expert witnesses are recoverable as costs under § 1920 only to the extent specified in § 1821.

Another striking example is found in the Equal Justice Act, 28 U.S.C. §§ 2401 *et seq.*, which provides that in suits against the United States: "a judgment for costs, as enumerated in section 1920 of this title" may be taxed against the United States. 28 U.S.C. § 2412(a). In so providing, however, Congress clearly understood and relied on the fact that § 1920 costs do not include private expert witness fees in excess of the amount set forth in § 1821. Recognizing that such statutory costs do not include expert witness fees, Congress has further provided that a party prevailing against the United States can recover "*in addition to*" the costs enumerated in § 1920 "fees and other expenses . . . [including] the reasonable expenses of expert witnesses." 28 U.S.C. § 2412 (d)(1)(A) and (d)(2)(A) (emphasis added). Congress thus reaffirmed its intent and understanding that authorization in addition to 28 U.S.C. §§ 1920 and 1821 is required before private expert witness expenses may be taxed.

Nor are these the only examples. In at least 34 provisions in 29 separate statutes, Congress has chosen to specify that under certain statutorily-defined circum-

stances litigants (often, however, only prevailing plaintiffs) may recover expert witness fees in addition to the costs normally recoverable in a civil action. *See* Administrative Procedure Act, 5 U.S.C. § 504(b)(1)(A); Consumer Product Safety Act, 15 U.S.C. §§ 2060(c), 2072 (a), 2073; Toxic Substances Control Act, 15 U.S.C. §§ 2618(d), 2619(c)(2), 2620(b)(4)(C); Petroleum Marketing Practices Act, 15 U.S.C. § 2805(d)(1)(C) (3), (d)(3); National Historic Preservation Act Amendments of 1980, 16 U.S.C. § 470w-4; Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(4); Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2632(a) (1), (b)(2); Tax Equity and Fiscal Responsibility Act of 1982, 26 U.S.C. § 7430(a), (c)(1)(A)(ii); Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(A); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270(d); Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1427(c); Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1734(a)(4); Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 928(d); Federal Water Pollution Control Act, 33 U.S.C. § 1365(d); Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g)(4); Deepwater Ports Act of 1974, 33 U.S.C. § 1515(d); Act to Prevent Pollution from Ships, 33 U.S.C. § 1910(d); Safe Drinking Water Act, 42 U.S.C. § 300j-8(d); Noise Control Act of 1972, 42 U.S.C. § 4911(d); Energy Reorganization Act of 1974, 42 U.S.C. § 5851(e)(2); Energy Policy and Conservation Act, 42 U.S.C. § 6305(d); Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972(e); Clean Air Act, 42 U.S.C. §§ 7413(b), 7604 (d), 7607(f); Clean Air Act Amendments of 1977, 42 U.S.C. § 7622(b)(1)(B), (e)(2); Power Plant and Industrial Fuel Use Act of 1978, 42 U.S.C. § 8435(d); Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. § 9124(d); Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1349(a)(5); Natural Gas Pipeline Safety Act, 49 U.S.C. § 1686(e); Hazard-

ous Liquid Pipeline Safety Act of 1979, 49 U.S.C. § 2014(e).[7]

A judicially-legislated exception to the rule of congressional control would substantially disrupt these statutory schemes. The situation of respondent Gibbons is a prime example. Gibbons is an antitrust plaintiff. Congress has been quite explicit from the very beginning of the antitrust laws that a prevailing antitrust plaintiff, but *not* a prevailing antitrust defendant, shall be entitled to recover its attorneys' fees and costs. *See* 15 U.S.C. § 15. Even this statutory provision has always been held insufficient to grant even a prevailing plaintiff the right to recover expert witness fees. *See Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 81 (2d Cir. 1971), *rev'd on other grounds, sub nom. Hughes Tool Co. v. TWA*, 409 U.S. 363 (1973), and cases cited therein; *State of Illinois v. Sangamo Construction Co.*, 657 F.2d 855, 866 (7th Cir. 1981); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 309 n.75 (2d Cir. 1979); *Ott v. Speedwriting Publishing Co.*, 518 F.2d 1143, 1149 (6th Cir. 1975); *Twentieth Century Fox v. Goodwin*, 328 F.2d 190, 224 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964).

Congress has reviewed the antitrust laws as much as any laws on the books, and has never seen fit to change this deliberate allocation of costs and risks. Congress' fee allocation decision is a well-considered one, designed to encourage plaintiffs and thus discourage anti-competitive behavior. *See Twin City Sportservice v. Charles O. Finley & Co.*, 676 F.2d 1291, 1312 (9th Cir. 1982); *Knutson v. Daily Review, Inc.*, 479 F.Supp. 1263, 1267 (N.D. Cal. 1979). Judicial legislation revising Congress' decision would be an unwarranted intrusion into congressional policy making. Again, the words of *Alyeska* are particularly apposite:

[7] Respondent in *Champion International*, No. 86-328, will discuss the fact that The Civil Rights Act of 1964 and The Civil Rights Attorneys' Fee Act of 1976 also provide for the recovery of expert witness fees by prevailing plaintiffs.

> We need labor the matter no further. It appears to us that the rule suggested here . . . would make major inroads on a policy matter that Congress has reserved for itself. Since the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorneys' fees beyond the limits of 28 U.S.C. § 1923, those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation . . . .

Alyeska, 421 U.S. at 269.

III. JUDICIAL LEGISLATION AMENDING CONGRESSIONAL POLICY ON EXPERT WITNESS FEES IS UNNECESSARY.

Not only is the rule requested by petitioners wrong, it is unnecessary. Federal Rule of Evidence 706 and 28 U.S.C. § 1920(6) provide for the taxation of the compensation of court-appointed experts. Under these provisions, the trial judge may, at the request of a party or at his or her own volition, appoint expert witnesses to assist the court, including expert witnesses nominated by one of the parties.

Court appointment of a witness nominated by one of the parties can and has been used to establish a statutory basis for later taxation of that witness' compensation as costs, *see, e.g., United States Marshal's Service v. Means*, 741 F.2d 1053, 1057-58 (8th Cir. 1984), and allows the parties to know in advance what costs may be taxed, and to object to unnecessary experts or expenditures.

As the Fifth Circuit pointed out in *International Woodworkers v. Champion Int'l Corp.*, 790 F.2d 1174, 1179 n.6 (5th Cir. 1986) (*en banc*), *cert. pending*, Sup. Ct. No. 86-328, Section 1920(6) acts as a "safety valve." The provision requires advance planning and argument, but certainly it is better for this Court to require a little advance planning than to overturn 130 years of congressional reliance on the meaning of the Fee Act.

IV. PETITIONERS' POLICY REQUEST FOR LEGISLATION HAS REPEATEDLY BEEN REJECTED BY THIS COURT.

Finally, petitioners argue that public policy requires that this Court reverse the court of appeals, so that antitrust plaintiffs will be deterred from bringing suits they may lose. This plea is badly misplaced.

As discussed in detail in Part II *supra*, the antitrust laws were specifically designed to encourage plaintiffs, not to deter them. Congress provided that only antitrust plaintiffs shall recover attorneys' fees, and the courts have consistently held that the antitrust statutes do not allow either plaintiffs or defendants to recover expert witness fees. Petitioners' argument that the court of appeals' decision should be reversed, to deter plaintiffs by making them liable for expert witness fees, is no more than a demand that this Court overturn long-standing congressional policy on antitrust law.

Further, because the law against award of expert witness fees under the antitrust laws is so clear, petitioners' public policy argument must paint with a much broader brush, and ask this Court massively to revise 28 U.S.C. §§ 1920 and 1821, and to hold that in all cases expert witness fees are recoverable as costs. Petitioners argue for an "exception" under which courts would have discretion to award expert fees where the expert's testimony was "essential" to the court's decision. In nearly every case involving economic, scientific, or statistical evidence, however, expert testimony will be "essential." As the Seventh Circuit pointed out in *Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 801 F.2d at 911, the exception would swallow the rule.

This Court has repeatedly held that if a revision to the American Rule is to be made, it must be made by Congress. *See, e.g., Alyeska*, 421 U.S. at 263-64; *Summit Valley Industries, Inc. v. Local 112*, 456 U.S. 717, 726

(1982) (refusing to expand NLRA § 303 to allow recovery of attorneys' fees); *F.D. Rich Co. v. United States*, 417 U.S. 116, 128-31 (1974) (no award of attorneys' fees under 40 U.S.C. § 270b(a); issues properly addressed by Congress); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 719-21 (1967) (absent specific statutory language awarding fees, none will be awarded under 15 U.S.C. §§ 1116, 1117). Congress has been clear in its intent for 130 years, and has reaffirmed its understanding in statute after statute. There is no reason for this Court to overturn Congress' decision.

CONCLUSION

Congress has set the public policies concerning the award of private expert witness fees. If petitioners have a plea, it is to Congress for statutory amendments, not to this Court for judicial legislation. The decision of the Fifth Circuit should be affirmed.

DATED this 19th day of February, 1987.

Respectfully submitted,

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No. 86-322

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

CRAWFORD FITTING COMPANY,
CAPITAL VALVE & FITTING COMPANY, INC.,
THOMAS A. READ & COMPANY,
FRED A. LENNON and ROBERT D. JENNINGS,
Petitioners

v.

J. T. GIBBONS, INC.,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR THE PETITIONERS

SUMMARY OF THE ARGUMENT

This Honorable Court accepted certiorari of this case in order to resolve the question of whether district courts have any discretion under Rule 54(d) of the Federal Rules of Civil Procedure to tax costs, such as expert witness fees, beyond the scope of those items listed in 28 U.S.C. §§ 1920 and 1821. The trial court below awarded Petitioners as taxable costs the fees of two of the three expert witnesses used by Petitioners at trial pursuant to

its inherent equitable discretion under Rule 54(d). That decision fully comported with the jurisprudence as it has developed over the years, the language of Rule 54(d) and this Court's interpretation of that rule.

Historically, courts in equity possessed a narrow discretion to award costs beyond the scope of the cost statutes, including expert witness fees, contrary to Respondent's suggestion otherwise. Adoption of the Federal Rules of Civil Procedure effected a merger of law and equity, and afforded district courts in all cases the equitable powers previously available only in equity. This Court confirmed in *Farmer v. Arabian American Oil Company*, 379 U.S. 227 (1964) that Rule 54(d) invested in the district courts a narrow discretion to award extra-statutory costs, and reiterated that this discretion was to be sparingly exercised. Both prior to and following *Farmer*, the district courts have obeyed this mandate and there is no reason to doubt their continued ability to do so.

The Fifth Circuit below essentially equated expert witnesses with attorneys and held that awards of both are governed by the same standards. This ignores the fundamental differences between the roles of attorneys and expert witnesses in the litigation process and sets an undesirable precedent. The attorney's role is to advocate his client's position. The role of the expert witness, on the other hand, is to assist the fact finder in resolving the issues in the case. Expert witnesses are not advocates and, indeed, where such a posture is perceived, courts have discredited their testimony or rejected it outright. Trial courts should be allowed to retain their discretion to award as costs the fees of experts whose testimony assists the court and the jury to resolve the issues in the case.

Finally, an ironclad rule prohibiting trial court discretion to award expert witness fees absent prior court approval is illogical and serves no useful purpose. Crucial

expert testimony remains crucial whether that determination is made by the court before or after trial. Moreover, in many cases, a trial judge is in the best position to evaluate both the necessity of the testimony and the reasonableness of the fee after trial. The district courts should be allowed to retain their discretion to make this decision at that time and to award or disallow the fees of the expert witness as the circumstances warrant.

ARGUMENT

I. THE TRIAL COURT'S EXERCISE BELOW OF ITS INHERENT EQUITABLE POWER WAS CONSISTENT WITH THE HISTORICAL DEVELOPMENT OF THE LAW, THE LANGUAGE OF RULE 54(d), AND THIS COURT'S INTERPRETATION OF THAT RULE

The trial court below exercised its inherent equitable discretion under Rule 54(d) of the Federal Rules of Civil Procedure to award Petitioners as taxable costs the fees of two of the three expert witnesses used by Petitioners at trial, whose testimony the court found to be essential to its resolution of the case. This exercise of discretion was consistent with the historical development of the law, the language of Rule 54(d) and this Court's own interpretation of that language. The position advanced by Respondent ignores the development of the law, reduces the language of Rule 54(d) to redundancy, and essentially disregards this Court's interpretation of that Rule.

A. Equity Practice As It Evolved Over The Years Recognized The Power Of The Courts To Award Costs Above And Beyond Routine Statutory Costs

Respondent contends it "has long been settled" that the Fee Act of 1853 and its statutory successors comprise the exclusive source of authority to award costs in all cases, whether at law or in equity, and that the only discretion historically afforded courts of equity, as

opposed to courts at law, was a discretion to decline to award these statutory costs to the prevailing party, or to otherwise apportion costs. Respondent's Brief at 7-12. This contention obviously ignores the current conflict in the federal courts of appeals concerning the scope of the district courts' inherent discretion to award costs.[1] More-

[1] Three Circuit Courts of Appeals have held squarely that district courts have inherent equitable discretion to award expert witness fees as costs upon a finding that the testimony was crucial and indispensable to the resolution of the case. *United States v. City of Twin Falls, Idaho*, 806 F.2d 862 (9th Cir. 1986); *Paschall v. Kansas City Star Co.*, 695 F.2d 322 (8th Cir. 1982); *vacated on other grounds*, 727 F.2d 692 (8th Cir. 1984), *cert. denied*, 469 U.S. 872 (1984); *Robert v. S.S. Kyriakoula D. Lemos*, 651 F.2d 201 (3d Cir. 1981). Two Circuit Courts have held that district courts have no discretion to award expert witness fees as costs, except in extraordinary circumstances, and that "indispensability" is not tantamount to extraordinary circumstances. *Quy v. Air America, Inc.*, 667 F.2d 1059 (D.C. Cir. 1981); *Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 801 F.2d 908 (7th Cir. 1986). The Fifth Circuit below has denied the district courts any discretion to award expert witness fees, except in the three equitable circumstances posited in *Alyeska* for awards of attorneys' fees. The Tenth and Eleventh Circuits have categorically denied district courts the discretion under Rule 54(d) to award expert witness fees. *Cleverock Energy Corp. v. Trepel*, 609 F.2d 1358 (10th Cir. 1979); *Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519 (11th Cir. 1985). The Sixth Circuit has observed simply that its opinions on the matter "appear to conflict." *Murphy v. Intern. Union of Operating Engs.*, 774 F.2d 114 (6th Cir. 1985), *cert. denied*, 2106 S.Ct. 1201 (1985). The Fourth Circuit has held only that the Clayton Act's allowance of cost of suit does not permit awards in excess of § 1920 costs, but has also expressly disagreed with the decision of the Fifth Circuit below. *Barber & Ross Co. v. Lifetime Doors, Inc.*, Nos. 86-1535(L), 86-1538, *slip op.* (available on LEXIS, Glenfed Library) (4th Cir. Jan. 30, 1987). The position of the First Circuit is unclear. *Compare Bosse v. Litton Unit Handling Systems, Inc.*, 646 F.2d 689 (1st Cir. 1981) *with Gradmann & Holler GMBH v. Continental Lines*, 679 F.2d 272 (1st Cir. 1982). The Second Circuit has denied the power to award such fees without discussion of *Farmer. Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 262 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

over, it overlooks the development of the historical equitable powers of the district courts. Petitioners respectfully submit that Respondent has grossly understated those powers.

Petitioners have no quarrel with the statement that the Fee Act of 1853 and its statutory progeny applied in all cases, whether at law or in equity, and that the costs listed therein should be and have been routinely awarded. That statute, however, by no means operated to curtail the historic power of courts sitting in equity to award costs beyond the statutory scope in their discretion. The federal courts have regarded the equitable foundation of this power as beyond serious question. *Sprague v. Ticonic Bank*, 307 U.S. 161 (1939); *Guardian Trust Co. v. Kansas City Southern Ry. Co.*, 28 F.2d 233, 243 (8th Cir. 1928), *rev'd on other grounds*, 281 U.S. 1 (1929) ("these statutes . . . are not the exclusive source of power in the federal equity courts touching the matter of costs"); *Reconstruction Finance Corporation v. J.G. Menihan Corp.*, 111 F.2d 940 (2d Cir. 1940), *aff'd on other grounds*, 312 U.S. 81 (1941) (stating that it is within the power of the trial court at its discretion to grant additional costs); *W.F. & John Barnes Co. v. International Harvester Co.*, 145 F.2d 915, 918 (7th Cir. 1944) (holding that in equity proceedings the Fee Bill Act of 1853 did not preclude trial courts from taxing as costs all items which were "necessary and helpful to the expeditious and proper trial of the issues"); *Cleveland v. Second National Bank & Trust Co.*, 149 F.2d 466, 469 (6th Cir. 1945), *cert. denied*, 326 U.S. 775 (1945) ("[t]here is no room for doubt that an equity court may, under extraordinary circumstances, impose upon the defeated plaintiff in an equity case, the entire cost of defense notwithstanding statutory limitations upon costs to be taxed at law."); *Barber-Coleman Co. v. Withnell*, 28 F.2d 543, 545 (D.Mass. 1928) ("[i]t has been settled that costs in equity proceedings are not restricted to the items specified in the statute"); *Gotz v. Universal Products*

Co., 3 F.R.D. 153, 155 (D.Del. 1943) ("[c]osts in equity causes are not limited to the items specified in the statute); *see also Cox v. Maddux*, 285 F. Supp. 876, 882 (E.D. Ark. 1968) (court has discretionary power to award costs not mentioned in statute where approved by court as essential to proper determination of case).[2]

A review of these cases discloses that what has "long been settled" is the historic power of courts in equity to award costs above and beyond routine statutory costs. The foregoing cases uniformly recognize that power; moreover, they teach that such costs are awardable only for predominating reasons of justice, unlike statutory costs which are routinely awarded, and, indeed, were mandatorily awarded in cases at law. 10 C. Wright and A. Miller, *Federal Practice and Procedure* § 2665 (1977). As this Court early observed concerning costs awarded pursuant to the courts' equitable discretion: "They are not of a routine character like ordinary taxable costs; they are contingent upon the exigencies of equitable litigation." *Sprague v. Ticonic Bank*, 307 U.S. at 169, *quoted* in *Cleveland v. Second National Bank & Trust Co.*, 149 F.2d at 470.

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[2] In support of its specific contention that equity courts never had the power to award expert witness fees in excess of those allowed by the Fee Act (either before or after this Court's decision in *Henkel v. Chicago, St. Paul, Minn. & Omaha Ry. Co.*, 284 U.S. 444 (1932)) and that "[e]quity courts were quite clear on the matter", Brief for the Respondent at 10, Respondent relies particularly upon *Bone v. Walsh Construction Company*, 235 F. 901 (S.D. Iowa 1916) and *Cheatham Electric Switching Device Co. v. Transit Development Co.*, 261 F. 792 (2d Cir. 1919). The holdings of both of these cases, it is submitted, are premised on the more general proposition that equity courts are restricted to awards of statutory costs only, a conclusion which must be viewed against the backdrop of the host of later decisions holding otherwise and cited hereinabove, including this Court's decision in *Sprague*. Indeed, at least three of those cases specifically addressed the issue of the award of expert witness fees as costs and the courts concluded or assumed they had the power to make such an award in their discretion, although each found that the circumstances before it did not warrant the exercise of that discretion. *See* cases cited at text, *infra* at p. 7.

The dearth of cases in equity which have actually taxed expert witness fees as costs, a point played up heavily by Respondent, Respondent's Brief at 17, does not support a lack of power to render such awards, but rather highlights the scrupulous care taken by the judiciary to award such costs only where the circumstances so warrant. *See e.g., Guardian Trust Company v. Kansas City Southern Railway Company, supra* (exhaustively reviewing historical bases of the courts' equitable powers and reversing and remanding lower court's refusal based on lack of power to award expert accountant's fees as costs); *Andresen v. Clear Ridge Aviation*, 9 F.R.D. 50, 54 (D.Neb. 1949) (case in equity wherein court held that the "power to tax the items of expense presently requested *undoubtedly* exists; and the standards by which it is to be exercised have been erected with reasonable assurance," but that "the setting of the testimony in this case [did] not justify" the exercise of its discretion in favor of such an award.); *Banks v. Chicago Mill & Lumber Co.*, 106 F.Supp. 234, 237 (E.D. Ark. 1950) (equity case in which court ruled that "[w]hile I have the power to allow as costs the compensation paid to expert witnesses for their preparation and testimony, I do not feel that this is a proper case for such an allowance."). This judicial exactitude has carried forward through the present date. *See* text, *infra* at 9-10.

B. The Merger Of Law And Equity Effected By The Federal Rules Of Civil Procedure Invested Federal Courts With Their Historic Equitable Powers In All Cases

With the merger of law and equity effected by the adoption of the Federal Rules of Civil Procedure in 1938, Rule 54(d) gave federal courts in all actions the broader discretion previously afforded only to courts of equity. *Harris v. Twentieth Century Fox Film Corp.*, 139 F.2d 571, 572 n.1 (2d Cir. 1943) ("[Rule 54(d)] appears to have adopted, for all suits covered by it, the previous

federal practice in equity, according to which the trial court had wide discretion in fixing costs, a discretion not reviewable unless manifestly abused . . . ."); *see also Prashker v. Beech Aircraft Corp.*, 24 F.R.D. 305, 311-12 (D.Del. 1959) ("the Rules of Civil Procedure [are] applicable to all civil actions . . . [and] . . . there is now no distinction between equitable or legal considerations as to the discretion of the court as to costs."). This Court's opinion in *Farmer v. Arabian American Oil Company*, 379 U.S. 227 (1964), decided subsequent to the merger of law and equity, clarified and confirmed the historic equitable power of the district courts under Rule 54(d) to award costs "not specifically allowed by statute," and re-emphasized what equity courts had recognized all along--that this discretion "should be sparingly exercised". 379 U.S. at 235.

Respondent contends that the issue before this Court was squarely decided in *Henkel v. Chicago, St. Paul, Minn. & Omaha Ry. Co.*, 284 U.S. 444 (1932). Petitioners have already dealt at length with the reasons why *Henkel* has little, if any, bearing on the issue before this Court. Petitioners' Brief at 19-22. To these arguments, Petitioners add only that *Henkel* did not purport to curtail or even deal with the equitable powers of the court, and that such was the conclusion of federal courts even prior to this Court's later decision in *Farmer*. In *Swan Carburetor Company v. Chrysler Corporation*, 55 F.Supp. 794 (E.D. Mich. 1944), *rev'd on other grounds*, 149 F.2d 476 (6th Cir. 1945), *cert. denied*, 317 U.S. 692 (1942), plaintiff relied upon the *Henkel* decision to support its position that the district court lacked authority to make an award of expert witness fees as costs. In rejecting this contention, the district court remarked that: "[t]hat case involved an action at law, and it is clear that that decision is not decisive of the question of allowances of costs in equity." 55 F.Supp. at 797. *Accord, Andresen v. Clear Ridge Aviation*, 9 F.R.D. 50 at 52 (D.Neb. 1949).

The most recent federal court decisions upholding the power of the district courts to award expert witness fees as costs in appropriate circumstances have relied upon *Farmer* in so doing. *E.g., Roberts v. S.S. Kyriakoula D. Lemos*, 651 F.2d 201 (3d Cir. 1981); *Paschall v. Kansas City Star Company*, 695 F.2d 322, 338-39 (8th Cir. 1982), *vacated on other grounds*, 727 F.2d 692 (8th Cir. 1984) (*en banc*), *cert. denied*, 469 U.S. 872 (1984); *United States v. City of Twin Falls, Idaho*, 806 F.2d 862, 877 (9th Cir. 1986). These decisions have not resulted in the "massive revision" of the law portended darkly by the Respondent. Respondent's Brief at 26. Far from it, they merely reflect the long-standing powers of the court to do justice according to the circumstances of each particular case. As this Court has recognized: "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Hecht Company v. Bowles*, 321 U.S. 321 (1944).

Moreover, these decisions have not triggered an avalanche of cases in which courts routinely award expert witness fees as costs. To the contrary, as even Respondent has noted, Respondent's Brief in Opp. to Pet. at 10-11, the judicial experience has demonstrated that courts exercise this equitable discretion with the restraint mandated by *Farmer*. The experience in the Third Circuit Court of Appeals is illustrative. Since the *Roberts* decision in 1981, the reported decisions of the district courts within the Third Circuit Court of Appeals reflect that they have exercised their discretion to award expert witness fees as costs with exemplary care, and that in the isolated instance where one court did not, the appellate court stepped in and checked such abuse. *Compare Rank v. Balshy*, 590 F.Supp. 787, 801-802 (M.D. Pa. 1984) (awarding fees of "well qualified and highly skilled" experts, whose testimony "played a crucial role

in the determination of the issues and was very helpful to the court and jury") and *Fahey v. Corty*, 102 F.R.D. 751, 753-54 (D.N.J. 1983) (awarding fees of expert witness who "was indeed indispensable to the presentation of plaintiff's claimed injuries and their causation", but observing also that "[b]y no means would this Court assert that every medical witness called by a litigant is 'indispensable' because of his expertise alone") *with N.A.A.C.P. v. Wilmington Medical Center, Inc.*, 530 F.Supp. 1018, 1027 (D.Del. 1987), *rev'd on other grounds*, 689 F.2d 1161 (3d Cir. 1982), *cert. denied*, 460 U.S. 1052 (1983) (disallowing fees, finding that "[w]hile the testimony of these witnesses was helpful to the Court, it cannot hold that their testimony was crucial or indispensable to the determination of this case . . . [and] [f]urthermore, the Court is without a factual foundation for determining the reasonableness of such fees and expenses") and *Delaware Valley Citizens v. Commonwealth of Pennsylvania*, 581 F.Supp. 1412, 1432 (E.D.Pa. 1984) (denying fees "since [the expert] did not testify before this court and since this Court is unable to determine whether [his] expertise helped resolve any issue"); *see also Black Grievance Committee v. Philadelphia Electric Company*, 802 F.2d 648, 657 (3d Cir. 1986) (reversing and remanding district court's award of fees because it failed to make specific findings concerning the indispensability of the expert's testimony").

II. BECAUSE EXPERT WITNESSES ARE INTENDED PRIMARILY TO AID THE FACT FINDER, AWARDS OF THEIR FEES SHOULD BE MADE ON A DIFFERENT BASIS THAN FEE AWARDS FOR ATTORNEYS, WHOSE JOB IT IS TO REPRESENT THE CLIENT

The federal courts have traditionally drawn a line between the expense incurred to facilitate the court's consideration of the case, and expense incurred merely

to aid one party in the presentation of his side. *See Ex Parte Peterson*, 253 U.S. 300, 315-16 (1920); Stockwell, *Expert Witness Fees—A Recoverable Cost In Federal Courts?*, Ariz. L.J. 225, 228 (1982) (hereinafter cited as "Stockwell"). Under the long-standing American rule, attorneys' fees, or "solicitor-client" costs, fall into the latter category and are not ordinarily recoverable. *E.g.*, *Fleischman v. Maier Brewing Company*, 386 U.S. 714 (1967).

In *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975), this Court invoked policy considerations to create a judicial limitation upon the circumstances in which a district court can exercise its equitable discretion to award attorneys' fees to a prevailing party. Relying upon the decision of the Fifth Circuit Court of Appeals below, Respondent contends that *Alyeska* controls disposition of the issues herein, asserting baldly that "attorneys fees and expert witness fees have always been treated alike" and that "there is no valid ground for distinction." Respondent's Brief at 15. Petitioner submits that the issue before this Court cannot be so patly resolved. There are fundamental differences between the roles of the attorney and the expert witness in the litigation process, differences which strongly support diverse treatment of the awards for their respective fees.

An attorney is an advocate retained by a litigant to represent that litigant's interests as zealously as possible. The role of an expert is quite different. Rule 702 of the Federal Rules of Civil Evidence provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise." This rule is a recognition that an intelligent evaluation of facts is often difficult if not impossible

without the application of scientific, technical or other specialized knowledge outside the ken of the trier of fact. Rule 702, Fed. R. Evid., Notes of Advisory Committee.

The role of the expert, therefore, is not to represent the interests of a particular litigant, but to assist the fact finder's determination of the issues in the case. *See United States v. R.J. Reynolds Tobacco Co.*, 416 F. Supp. 313, 315 (D.N.J. 1976) ("it is the very purpose of expert testimony to assist the trier of facts . . . to understand, evaluate, and decide the complex evidential materials in a case"); *United States v. 364.82 Acres of Land*, 38 F.R.D. 411, 416 (N.D. Cal. 1965) ("the expert has but one duty—the duty to use his expertise honestly and fairly so that justice may be done . . . [t]hat duty transcends any possible duty to [the lawyer who hires him]"). Indeed, often where the expert witness assumes the role of advocate, little weight has been given to his testimony and it even has been rejected outright. *See e.g., Olympia Equipment Leasing Co. v. Western Union Telegraph*, 797 F.2d 370, 382 (7th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3644 (1987); *Albers v. Church of the Nazarene*, 698 F.2d 852, 858 (7th Cir. 1983) ("experts are nowadays often the mere paid advocates or partisans of those who employ and pay them, as much so as the attorneys. . . ."); *In re Air Crash Disaster at New Orleans, La.*, 795 F.2d 1230, 1233 (5th Cir. 1986) ("the trial judge ought to insist that a proffered expert bring to the jury more than the lawyer can offer in argument. . . . [i]ndeed, the premise of receiving expert testimony is that it 'will assist the trier of fact to understand the evidence or to determine a fact in issue'"); *Viterbo v. Dow Chemical Company*, 646 F. Supp. 1420, 1425 (E.D. Tex. 1986) ("where an expert becomes an advocate for a cause, he therefore departs from the ranks of an objective expert witness, and any resulting testimony would be unfairly prejudicial and misleading."); *Johnston v. United States*, 597 F. Supp. 374, 411 (D.Kan. 1984); *C. van der Lely*

N.V. v. F. Lli Maschio S.n.c., 222 U.S.P.Q. (BNA) 399, 402 (S.D. Ohio 1984)); *Deltak, Inc. v Advanced Systems, Inc.*, 574 F. Supp. 400, 405-406 (E.D. Ill. 1983), *vacated on other grounds*, 767 F.2d 357 (7th Cir. 1985); *Mobil Oil Corp. v. Filtrol Corp., et al.*, 186 U.S.P.Q. (BNA) 252, 262 (C.D. Cal. 1975).

Much has been written by courts and commentators alike about "the age-old problem of expert witnesses who are 'often the mere paid advocates or partisans of those who employ and pay them, as much so as the attorneys who conduct the suit." *Chaulk By Murphy v. Volkswagen of America, Inc.*, 808 F.2d 639, 644 (7th Cir. 1986) (Posner J., dissenting); *In re Air Crash Disaster at New Orleans, La.*, 795 F.2d at 1234 ("the professional expert is now commonplace . . . [and] spends substantially all of his time consulting with attorneys"); *Hatmakers v. Dry Milk Co.*, 29 F.2d 918, 922 (S.D.N.Y. 1929) (the expert witness is forced to become an advocate and is expected to maintain the conclusions which will best serve the interest of the litigant who employs him); Carlson, *Policing The Bases Of Modern Expert Testimony*, 39 Vanderbilt L.Rev. 577, 587 (1986); Hubert, *Safety And The Second Best: The Hazards Of Public Risk Management In The Courts*, 85 Colum. L. Rev. 277, 333 (1985) ("a Ph.D. can be found to swear to almost any 'expert' proposition, no matter how false or foolish."). This is viewed as a problem precisely because the use of the expert in such circumstances is perverted from its intended purpose. Respondent's argument is premised on the assumption that such uses of the expert witness are and should be the rule, rather than the deviation from that rule. If this Court does not roundly reject such an argument, the result will be a clear signal to the bench and the bar that this perversion has now been deemed acceptable. Petitioners respectfully submit that this Court should not implicitly sanction the use of experts as "mere paid advocates." When, as in the case

at bar, an expert witness fulfills the role for which he was intended—providing evidence which assists the court or jury, and does not merely benefit a private party in the presentation of its side of the case—the trial court should be allowed to exercise its discretion to award as costs the fees of such expert.

III. A RULE OF PRIOR COURT APPROVAL SHOULD NOT BE CONSTRUED SO AS TO PRECLUDE A DISTRICT COURT FROM EXERCISING ITS EQUITABLE DISCRETIONARY POWERS

Federal Rule of Evidence 706 provides a procedure for court appointment of expert witnesses nominated by the parties or otherwise, and 28 U.S.C. § 1920 (6) allows their fees to be taxed as costs. Respondent suggests that, unless prior court approval is obtained, district courts should be barred absolutely from exercising any discretion to award expert witness fees as costs. Such a rule, it is argued, acts as a safety valve by allowing the parties a kind of "fair warning" that expert witness fees will be sought, and an opportunity to object beforehand to unnecessary experts or expenditures. Respondent's Brief at 25.

Petitioners respectfully submit that this reading of Rule 706 and 28 U.S.C. § 1920(6) is as unwarranted as it is unnecessary. Nowhere in the language of those statutes is there any indication that the procedures provided for therein are exclusive. Such a judicial gloss would make little sense. In the first place, a rule allowing district courts to wield their long-standing equitable discretion in this area serves equally as well to alert litigants of the potential for such an award. Secondly, as a practical matter, a district court is unable in many cases to evaluate with certainty the necessity or importance of an expert's testimony until after it has heard such evidence. *See United States v. City of Twin*

Falls, Idaho, 806 F.2d 862, 878 (9th Cir. 1986) ("Because the trial court will be better able to evaluate the importance of expert testimony at the conclusion of the trial, . . . prior application and approval of an enhanced fee for the expert's testimony is not required.").

The losing party's interest in protecting itself against exorbitant awards is adequately protected by objection to the cost award following trial, at which time the court is in the best position to make this determination. The experience in the instant case demonstrates this point well: the trial court reviewed the testimony of each of the three expert witnesses used by defendants at trial and disallowed as taxable costs more than 40% of the fees incurred in connection with that testimony. App. C at 37a. There is simply no logical reason to permit taxation of expert witness fees upon prior application but to deny taxation of essential expert witness fees upon resolution of the case. "Crucial expert testimony remains crucial whether the court makes the determination before or after trial." Stockwell, *supra* at 239. In the majority of cases, it is only at the close of trial that a court will know with certainty whether the expert testimony has performed its intended purpose of assisting the fact finder resolve the issues in the case.

CONCLUSION

Petitioners herein are not asking this Honorable Court to re-write the law, but rather are seeking simple confirmation of the long-standing inherent equitable power of the federal district courts, a power which those courts have consistently exercised with the utmost regard for the prevailing standards governing its proper use. The so-called "exception" posited by Respondent, which is not really an exception at all, will not "swallow the rule." It has not done so in the past, and nothing in the recent experience of the judiciary has indicated that it will do so now or in the future. The district courts of the

United States should be allowed to exercise their equitable discretion to award expert witness fees as taxable costs where the testimony offered by that witness serves its purpose of providing essential assistance to the resolution of the case, and where countervailing considerations do not weigh against such an award. Such considerations, including the indigency or the good faith of the losing party, the absence of a clear victory, and any misconduct or bad faith on the part of the prevailing party, are all factors which have been traditionally considered by the district judge in applying his or her discretion under Rule 54(d). L. Bartell, *Taxation of Costs and Awarding Expenses in Federal Courts*, 101 F.R.D. 553, 559-562 (1983).

All of these factors and many more were carefully considered by the trial judge below in concluding that Petitioners were entitled to an award as taxable costs of the fees of two of the three experts utilized by them at trial. This Court should reverse the holding of the Fifth Circuit Court of Appeals and reinstate the judgment of the trial court in its entirety.

Respectfully submitted, this 22nd day of April, 1987.

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